No. 101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCZAK, JOHN K. MCKEE, ERNEST G. DRAPER and RUDOLPH M. EVANS, PETITIONERS,

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

RESPONDENT'S BRIEF.

SAMUEL B. STEWART, JR.,
LUTHER E. BIRDZELL,
300 Montgomery Street, San Francisco 4, California,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 101.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCZAK, JOHN K. McKEE, ERNEST G. DRAPER and RUDOLPH M. EVANS, PETITIONERS,

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

RESPONDENT'S BRIEF.

QUESTIONS PRESENTED.

The petitioners' statement of the questions presented, although altered from those presented in their petition for certiorari, is still not accurate. There is one, and only one, question of substantive importance presented by this case. It may be more accurately stated as follows:

(1) Did the Board[1] exceed its statutory authority in requiring the System membership of an admittedly qualified and eligible bank to be subject to forfeiture, upon notice from the Board, in the event of the acquisition (which the Bank was powerless to prevent) of "any interest", however small, in its stock by a purchaser, which, without a hearing of any kind, has been proscribed by the Board?

There is no element of either estoppel or prematurity in this case. A more accurate statement of the second and third questions would be:

(2) Assuming that the Board has acted without authority of law in imposing a condition of membership upon an admittedly eligible applicant state bank, is such bank nevertheless bound by such invalid condition if it agreed to it (there being no statutory provision for obtaining Federal Reserve membership by agreement)?

(3) Did the District Court have jurisdiction to entertain a declaratory judgment action attacking the validity of a condition which, by its terms, constituted a continuing threat to the respondent's right to continue the exercise of its corporate functions, the Board having refused after demand to cancel the condition or remove the threat?

STATUTES INVOLVED.

The pertinent statutory provisions are set forth in the Appendix (*infra*, pp. A-1 to A-12).

---

[1] In the interest of brevity, this brief will sometimes refer to the Board of Governors of the Federal Reserve System as "the Board", to the respondent Peoples Bank as "the Bank", to the Federal Reserve System as "the System", and to the Federal Reserve Act as "the Act".

STATEMENT.

The purported official act that gives rise to this controversy is the imposition by the Board upon the Bank of the following as a condition of membership in the System (R. 59):

> "4. *If,* without prior written approval of the Board of Governors of the Federal Reserve System, *Transamerica* Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, *acquires,* directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock or in any other manner, *any interest in such bank,* other than such as may arise out of usual correspondent bank relationships, such *bank,* within 60 days after written notice from the Board of Governors of the Federal Reserve System, *shall withdraw* from membership in the Federal Reserve System."

The emphasized words[2] make it apparent that the petitioners' statement of the first and principal question (Pet. Br. p. 2) is not only inaccurate but misleading. The Board did not condition "respondent's admission to the Federal Reserve System upon the maintaining of its independence of Transamerica Corporation". It conditioned the membership on the bank's withdrawal on notice from the Board if Transamerica should acquire "any interest in such bank" without the Board's permission. It is now argued by the petitioners that the whole of Condition No. 4 must be construed literally and the bank can be expelled at the Board's option if *any stock interest* is acquired

[2] All emphasis in this brief is ours unless otherwise indicated.

without its permission. A more accurate statement of the question, therefore, is as stated above in this brief.

The complaint alleges (par. XI, R. 6), and the answer necessarily admits, that Transamerica Corporation has completed the act which, according to the condition, *but not according to the Act* (§ 9(8); 12 U. S. C. § 327)[3], works a forfeiture of the plaintiff's membership in the System. This proceeding is brought to determine whether that constitutes a legal ground of forfeiture. Plaintiff seeks a declaratory judgment which will remove the continuing threat to which it is now subject.

In view of petitioners' misinterpretation of the main issue in the case, it is not strange that their statement of facts (Pet. Br. pp. 2-8), as well as their discussion of applicable statutes (Pet. Br. pp. 12-29), is also over-simplied, superficial and incomplete. There are at least three important groups of facts which have been entirely overlooked or avoided in the petitioners' discussion:

1. The most unique oppressive characteristics of Condition No. 4 are that, unlike any condition prescribed in the Board's regulations (Pet. Br. p. 5, fn.2), and, unlike any other condition heretofore imposed by the Board and regarded by counsel as sufficiently analogous to be called to this Court's attention (Pet. Br. pp. 14-15, fn.5), Condition No. 4 neither forbids nor requires Peoples Bank to do anything relating to its assets or liabilities, the nature of its business or policies, the character of its operations or management. Indeed, there is nothing the respondent

[3] Appendix, p. A-2.

bank *can* do "to comply" with the Condition except "withdraw from membership in the Federal Reserve System". Petitioners' most bitter criticism of the Court of Appeals opinion is directed at that Court's interpretation of Condition No. 4 and the related subsequent resolution of the Board as contemplating a hearing, in advance of expulsion, as to whether "Transamerica's ownership of the bank's shares has resulted in a change for the worse in the character of the bank's personnel, in its banking policies, in the safety of its deposits, or in any other substantial way". According to petitioners, the requirement of *such* a hearing and determination, in advance of expulsion, would "emasculate the Condition * * * thus stripping the Condition of its vitality" (Pet. Br. p. 30). Counsel reiterate the Board's intent that it should be "empowered * * * to take action if Transamerica acquired 'any interest' in respondent" (Pet. Br. p. 32). Counsel now admit unmistakably, if subtly, that the only subject of inquiry at a hearing before the Board would be whether respondent "has failed to comply with the provisions" of Condition No. 4, i.e., whether respondent has withdrawn.

Petitioners have mistakenly assumed that if they can establish any connection between the contingency upon which the condition is hinged and the well being of the respondent Bank or the public interest, they have established their power to prescribe it. However effective this assumption may be as a means of distracting attention from the true character of the condition, the administrative history of conditioning membership and the basic statutory authority, it leaves unanswered every fundamental question involved. Such an assumption obviously proves too much. It would justify with

even greater plausibility conditioning membership on crop failure, depression, credit expansion, inflation or any other of the numerous causes of banking difficulties which are sources of concern to the Federal Reserve System. It would even justify what the Board really appears to want: a condition without regard to law, without regard to published regulations, without regard to the character of a member bank's personnel, its banking policies, or the safety of its deposits,—a condition which will replace all existing forms of conditions, viz., "the bank shall withdraw, on sixty days' notice". That is the effect of the decision petitioners are seeking from this Court.

2. The Condition does not relate to any fact in existence, or capable of being changed at the time of the bank's admission to membership. The complaint alleged (pars. V, VII, VIII, R. 3-4), the answer necessarily admitted and the court below found (R. 121-123) that the Board, acting on the application of Peoples Bank for membership in the System, took into consideration all factors prescribed by statute, found the bank in all ways qualified and eligible for membership and *then* imposed the condition in question.

The condition starts by describing as a contingent event a transaction between third parties, consummated without the prior written consent of the Board. It is not assumed in the condition that the Bank itself will have any power either to permit or prevent such a transaction, but it is clearly implied that the Board will have power either to permit or decline to permit it. Further, it is seen that the transaction relates to a matter that will not affect any business the Bank is authorized to transact, nor its assets or liabilities. It

would not be reflected in the Bank's balance sheet at all. This is doubtless the reason it is worded differently from all of the five allegedly similar conditions which the Solicitor General has described to the Court (Pet. Br. pp. 14-15, fn. 5) as supplied to him by the Board. Each of the cited conditions pertained to a matter *within the power of the bank to control.* The obligation, therefore, was placed on the bank in each instance to make the required adjustment.

For the condition in question to have been analogous to those cited by the Solicitor General it would have followed the pattern of the three stereotyped conditions stated in the Board's regulation (Pet. Br. p. 5, fn. 2), and in the extraordinary ones cited by the Solicitor General. It would have said in substance: "*The bank* shall not permit, without the prior written approval of the Board of Governors of the Federal Reserve System, the acquisition by Transamerica Corporation of any interest in such bank." So worded, however, the condition would have immediately challenged attention to the Bank's lack of power with respect to such a transaction. It would have stated or directly implied a legal impossibility. Therefore, avoiding the appearance of a legal monstrosity and in order that the condition would appear to be vitalized it became necessary to add an appendage which would relate the condition to something *the Bank* would have power to do or not to do. So a second element was added. In the event of the happening of the proscribed and uncontrollable contingency, says the Board, "such bank, * * * shall withdraw from membership in the Federal Reserve System" at the Board's option.

Withdrawal, since 1917, has been within the power of every state bank "desiring to withdraw". *This is the only part* of the condition the breach of which can be charged to the Bank. But it is also merely the statement in substance of the procedure for terminating membership for non-compliance with any true condition. This provision stamps Condition No. 4 as most unique. The reason for adding it here becomes most obvious when we observe the Board's general regulation. It provides as follows:

> "Every *State bank* while a member of the Federal Reserve System— * * *
>
> (c) *Shall comply* at all times with any and all conditions of membership prescribed by the Board in connection with the admission of such bank to membership in the Federal Reserve System." (Code of Federal Regulations, Title 12, Chap. II, Sec. 208.7.)

A "condition" is a requirement exacted of *the bank*. That is what the law says and that is what the Board's regulation says. There can be no question about it. The statute governing membership forfeiture (Act § 9 (E); 12 U.S.C. § 327)[4] authorizes the Board, after hearing, to forfeit the membership of a state bank if such *"bank has failed to comply with the provisions of this section* (§ 9; 12 U.S.C. §§ 321-338) *or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto."*

Surely it is perfectly clear that this condition is so worded that its breach by the Bank does not involve the failure to comply with any provision of Section 9 and that the *only* failure of the Bank to "comply"

---

[4]Appendix, p. A-2.

with a regulation of the Board would consist in its failure to withdraw upon notice. *No other violation could be charged.*

That part of this condition addressed to third parties and concerned with their business is only the statement of a contingency. Conditions of membership must be addressed to the bank and relate to its affairs. That part of the condition relating to withdrawal is addressed to the Bank, but it is activated only by the volition of the Board which, the petitioners claim, need not be related to nor prompted by the Bank's condition or management. It is a mere statement of a substitute for the prescribed expulsion procedure and is made possible only by the 1917 amendment respecting voluntary withdrawal (Act § 9(9), 12 U.S.C. § 328).[5]

The 1917 amendment was made on the recommendation of the Board to encourage membership, but the petitioners' present argument is that Congress thereby enlarged the Board's authority to attach conditions of membership. If their position in this case should be upheld it would mean that the Board, by the simple device of attaching a withdrawal clause, could expel any bank without regard to its condition or management, just as it claims the right to expel the respondent in this case.

We submit that the clause is not a condition of membership at all, but an unauthorized procedure for expulsion. Of course, if the Bank should voluntarily withdraw, that would be the end of the matter. The real question is whether the Board could expel the

---

[5] Appendix, p. A-3.

Bank if, having no desire to do so, it should not withdraw.

3. While, in our view, Condition No. 4 is unlawful on its face regardless of its purpose, its illegality in purpose, as well as in effect, is emphasized by the undisputed factual background and circumstances leading up to the imposition of the Condition and the clear contrast between the apparent ulterior purpose of the Condition and the Congressional intent declared in the applicable statutes. The Board's long-standing and openly expressed antagonism to Transamerica Corporation, the complaints of Board members to Congressional committees respecting its lack of power to prevent Transamerica's growth, its secret agreement with other bank regulatory agencies as to a "policy" of discrimination against Transamerica and banks in the shares of which Transamerica might invest, and its simultaneous use of an application by this respondent (the smallest bank in Los Angeles County) as an innocent and unsuspecting vehicle through which to give expression to this secretly determined anti-Transamerica policy, all help to highlight the true meaning, basis and effect of Condition No. 4. Since that factual background has been almost completely ignored in petitioners' brief, we summarize it briefly here. These facts are undisputed in the record (R. 33-61).

The organization of the respondent bank was begun in the fall of the year 1941. The California Superintendent of Banks made an investigation which satisfied him that the public convenience and advantage would be promoted by the establishment of a new bank in the proposed location. He granted the requisite permission, stating, however, that his commitment was

"based on the condition that you will have obtained Federal Deposit Insurance which shall be effective concurrently with your opening for business" (R. 35-36).

There were two ways prescribed by law for a state bank to obtain Federal Deposit Insurance: (1) by direct application to the Federal Deposit Insurance Corporation; and (2) by an application for membership in the Federal Reserve System, which, under the law, automatically carried with it Federal Deposit Insurance.[5a] The organizers of the respondent bank chose membership in the Federal Reserve System.

By November 28, 1941, when respondent's original application for membership was filed, the bank was already incorporated, had its capital raised, its location rented, its stationery printed, was in process of being equipped, and the parties interested expressed themselves as "very, very anxious for the bank to open at the earliest possible date, in order to take advantage of, amongst other things, the transfer of savings funds and holiday deposits which are certain to be available" (R. 41). Nothing was heard from the petitioners, however, until February, 1942.

The complaint alleges (par. V, R. 3) *and the answer necessarily admits that in November, 1941, when its application for membership was submitted, the Bank was in all respects qualified and eligible for membership in the System, and that its application for such membership was made pursuant to the prescribed rules and regulations.* The Bank's eligibility otherwise appears from the very fact that it was admitted

---

[5a] Act § 12B(e)(f), 12 U.S.C. § 264(e)(f); Appendix, pp. A-6 to A-8.

to membership subject to no condition whatsoever relating to the perfecting of its eligibility.

Notwithstanding the Bank's eligibility, a letter was written on behalf of the Board, under date of February 14, 1942, advising that the Board "is unwilling to approve the application on the basis of the information now before it" (R. 49).

This cryptic denial was personally investigated in Washington by Mr. John S. Griffith, a shareholder and director of the Bank, and his affidavit (R. 61-62) sets forth the substance of his conversation there with two members and the Secretary of the Board. Mr. Griffith was there informed:

> "that upon assurances that the Peoples Bank was independent of Bank of America and Transamerica Corporation the Board might be disposed to reconsider the application" (R. 62).

Although it is admitted (Pet. Br. pp. 3-4) that the Bank and all of its stockholders complied with all requirements of the Board in connection with such reconsideration (R. 53-58), an examination of the letter which the Board required each stockholder to sign (R. 58) reveals that the stockholders *did not consent* to the imposition of Condition No. 4 and, indeed, that they were not requested to consent. Each of them simply signed a letter reading as follows:

> "I, the undersigned, being a stockholder of the Peoples Bank, Lakewood Village, California, do hereby state that I have no arrangements, expressed or implied, with respect to the sale or transfer of the stock of the Bank which I own to either the Transamerica Corporation, or any other Bank Holding Company group, and that I do not intend to enter into any such agreements or understandings" (R. 58).

There is not the slightest suggestion in this record that the representations of fact and of present intention so made by the Bank's stockholders were inaccurate in any respect.

The Board of Governors then approved the application for membership by a letter dated May 6, 1942 (Complaint, par. VI; R. 4, 58-61). It was then, for the first time, that the Board stated its requirement of Condition No. 4 (R. 59).

It will be remembered that five months had elapsed since the bank was completely ready to open for business and "very, very anxious" to do so. It had no economic alternative at that time but to open its doors under the shadow of this unprecedented restriction, which it will be noted is much broader than the commitment of the shareholders, and hope that no occasion would arise in which the Board could invoke it. It also had every reason to expect, at the time when the condition was accepted, that if it should ever be given notice to withdraw from the System by the invocation of Condition No. 4, it would at least be able to obtain Federal Deposit Insurance by a direct application as a non-member state bank, and would not be wholly prevented from pursuing its chartered purposes (R. 31-32). It will be noted that the petitioners and their representatives carefully avoided disclosing to the Bank in these prolonged negotiations that they had already agreed with the Federal Deposit Insurance Corporation that the latter would refuse to insure its deposits after the acquisition of an interest in its stock by Transamerica Corporation, if it should "withdraw from the Federal Reserve System". That disclosure was first made by the petitioner Eccles in a letter to Mr. A. P. Giannini, Chairman of the Board

of Transamerica, on November 13, 1942 (R. 65, 84), and was not made known to the respondent bank until March 24, 1944, nearly two years after the original imposition of the condition (R. 32, 107).

Unfortunately for the Bank,—in that this lawsuit was thereby made necessary—respondent was wholly without power to prevent its stockholders from selling stock owned by them to any person or corporation they saw fit, and they had not even been called upon to restrict their right to do so. The complaint alleges (par. X, R. 5-6) without denial by the answer that respondent has no power of control over the dealings of its stockholders with their stock, and hence was utterly without power to prevent a violation of Condition No. 4. It would be ridiculous to suggest that the Bank had power to prevent some bank in the so-called "Transamerica group" or Bank of America from making a loan to a stockholder and taking a pledge of the Peoples Bank stock as security for that loan. Yet even such a transaction would constitute a violation of Condition No. 4.

No matter what respondent bank did, no matter how much it might have desired to avoid conflict with the petitioners concerning their anti-Transamerica "policy", respondent realized for the first time on March 24, 1944, that if this Condition No. 4 were not adjudged invalid, respondent's very existence might be terminated at any time at the whim of these petitioners,—all because Transamerica Corporation had bought 500 (out of a total of 5,000) of the outstanding shares of respondent's capital stock (Compl., pars. XI, XII and XIII, R. 6-7). Accordingly on that day respondent's Board of Directors authorized the insti-

tution of legal proceedings to determine the legal effect of Condition No. 4 (R. 32).

Suit was commenced immediately against the Board and others in the United States District Court for the Northern District of California, but the Board declined to submit to the jurisdiction and that case was dismissed (R. 32).

Peoples Bank v. Federal Reserve Bank of San Francisco, et al., 58 F. Supp. 25 (N.D.Cal. 1944); appeal dismissed 149 F. 2d 850 (C.C.A. 9th, 1945).

Thereafter, a formal demand for the cancellation of Condition No. 4 was made upon the Board on December 4, 1945, but was not complied with (Complaint, par. XIV, R. 7). This action was then commenced on December 24, 1945.

The complaint alleges and the answer necessarily admits that the termination of the Bank's System membership would cause it to lose its status as an insured bank, and "such loss would render the plaintiff unable lawfully and advantageously to pursue its functions as a bank and to conduct its operations to the advantage of its stockholders and the public served by it under supervision according to law" (par. X, R. 5-6).

The documentary evidence annexed to the affidavits submitted by the Bank also shows the circumstances in which the petitioners' anti-Transamerica "policy" was developed. No pretense was made that it represented the Congressional intent. No claim was made that the petitioners had any legal right to stop the expansion or prevent the further investment in bank stocks by Transamerica Corporation. No suggestion

is made that either the Bank or Transamerica Corporation or anybody else affected by the so-called "policy" was given any opportunity to attend any administrative hearing looking toward the establishment of such "policy" in the public interest (R. 66-67). Indeed it is not suggested that the phrase—"in the public interest"—even appears anywhere in the Federal Reserve Act in relation to member banks. Instead, we have the bald admission by these petitioners and their representatives that they, in secret meeting with the Comptroller of Currency and the Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, unanimously agreed that they should

> "under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group" (R. 69-70),

and that the Federal Deposit Insurance Corporation should decline

> "to insure any newly organized state nonmember bank in which Transamerica Corporation has a substantial interest or *any bank in the group which may withdraw from the Federal Reserve System*" (R. 84).

In view of the unique character of Condition No. 4,—the only instance brought to the court's attention in which compulsory withdrawal on notice has been made a condition of membership—it is apparent that the words italicized in the last quotation were aimed directly at this respondent bank.

The petitioner Eccles, Mr. Leo T. Crowley, who was then Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, and other spokesmen for the petitioners have admitted time and again in testimony before Congressional committees and other public records (despite implications to the contrary in Condition No. 4), that they do not possess any power under existing law to restrict the expansion of bank holding companies; and the Congress, although aware of this condition and of the petitioners' desire for such power, has steadfastly refused to enact any legislation designed to confer such power (Andrews aff., R. 67-68; Exhs. 24, 25, 26, 27 and 28, R. 96-103), although, as this Court is doubtless aware from its knowledge of current events, contemporaneously with the filing of the petition for certiorari in this case, the petitioner Eccles was renewing his plea to Congress for the enactment of a bill (S. 829, 80th Congress, First Session), which would give the Board the power to do that which in this case they are seeking to convince this Court they already have the power to do. Chairman Eccles testified before the Senate Banking and Currency Committee on S. 829, on May 26, 1947, as follows:

> "In order to establish branches, national banks must first obtain permission from the Comptroller of the Currency, State member banks from the Board and non-member insured banks from the FDIC. But the bank holding company is not subject to any such requirements. If a bank in its group is denied the right to establish an additional office, *there is nothing to prevent it from acquiring the stock of an existing bank* and simply adding the institution to its list of controlled banks, operating it, for all practical pur-

poses, as a branch of the entire system." (Transcript of Hearings, p. 17.)

The bill was favorably reported to the Senate, but the Congress adjourned without taking further action respecting it.

Petitioners now agree (Pet. Br. p. 8, fn.3) that they have "admitted that the law as it now stands does not empower the Board to disapprove bank acquisitions by bank holding companies *generally*". In their actual testimony before Congressional Committees, however, they have several times admitted their lack of power to prevent additional bank stock purchases by Transamerica Corporation *specifically* (R. 98, 100, 101).

The imposition of Condition No. 4 upon the Peoples Bank permit was part and parcel of the Board's anti-Transamerica "policy". This is apparent not only from the wording of Condition No. 4 but from the circumstance that the letter from the Board denying the original Peoples Bank application for membership was written on the same day and signed by the same man as the letter to Transamerica Corporation announcing the adoption of the "policy" of declining permission to Transamerica to acquire "any substantial interest" in banks (R. 63-64; 69-70).

The correspondence annexed to the Andrews affidavit (Exhs. 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, R. 69-96) shows eloquently on its face the atmosphere in which Condition No. 4 and the entire anti-Transamerica "policy" were conceived. Indeed, the correspondence shows more than that. It contains one labored effort after another by the petitioner Eccles to state

arguments which might indicate that such a "policy" would be in the public interest, and it shows that each such effort was answered with a recital of facts,—indisputable facts generally based on official statements and reports—which foreclosed the possibility of a plausible answer. And all the while, it was conceded by the defendants that the Congress,—the only body vested by the Constitution with a lawful right to declare such a policy, assuming it to be in the public interest, had turned a deaf ear to the pleas of the petitioners to pass a law authorizing the enforcement of their "policy".

The final evidence that Condition No. 4 was imposed on the respondent in an endeavor to effectuate a policy of discrimination, applicable with special violence to the respondent but founded in the official dislike for Transamerica Corporation, is referred to in the Ponsford Affidavit (R. 103-106). That affidavit, summarizing official publications of the Board, shows that at or subsequent to the time of admission of Peoples Bank to membership in the System, five state banks—two in Montana and three in Minnesota—have been admitted to membership, although affiliated with Northwest Bancorporation, a bank holding company. It also discloses that since the date of admission of Peoples Bank to the Reserve System there have been admitted to such system four California state banks, one of which has recently been absorbed by the American Trust Company of San Francisco, a state member bank operating a large branch banking system. It further appears that the American Trust Company has actually been authorized by the Board to operate a branch at the location of said absorbed bank.

The complaint alleges that Condition No. 4 was and is "arbitrary, unreasonable, capricious, discriminatory, *ultra vires* the authority of the Board, null and void", etc. It further alleges that any action taken pursuant to said void Condition No. 4 would constitute a taking of respondent's property without due process of law (par. IX, R. 5). Certainly, the allegations as to the arbitrary and discriminatory character of Condition No. 4 are allegations of fact which are admitted by the answer. The official records of the Board which are not available to the Bank without discovery, could disclose beyond dispute whether any condition comparable to Condition No. 4 has been imposed upon any of the other nine institutions mentioned. There has been no such disclosure. The hearsay disclosure now made by the Solicitor General (Pet. Br. pp. 14-15, fn. 5) sustains fully respondent's contention that in no other instance has the Board imposed a condition in which the proscribed conduct was wholly beyond the control of the member bank subjected to the Condition. In these circumstances and in view of the undisputed facts in this record, the charge of discrimination is clearly established as an undisputed fact.

The present injury and continuing embarrassment to the Bank from Condition No. 4 and the nature and extent of its interference with the normal conduct of respondent's business,—including the impairment of respondent's ability to compete with other banks freely and on a basis of equality—are readily apparent from a reading of the condition. Such effects are strongly corroborated by the affidavits of Mr. Brewer, the President of respondent bank (R. 106-108), and of Mr. Luddy, a stockholder and director, who pur-

chased his stock without knowledge of the existence of Condition No. 4 (R. 109-110).

SUMMARY OF ARGUMENT.

I.

The undisputed facts show that the respondent Bank, through the imposition of a so-called condition of membership, is unwittingly made the chosen instrument of the petitioners in an unprecedented effort to exercise a power which, by their own later confession, is non-existent—a power to restrict and supervise the investment of one corporation in bank stock. They show that this restriction is arbitrary and discriminatory and has been attempted without any proceedings having been taken with respect to such corporation pursuant to any law. They further show that the petitioners concealed from the respondent, at the time of its admission to membership in the Reserve System, the secret plan of the petitioners and others to aggravate the resulting unfortunate position of the respondent through an extra legal commitment of the Federal Deposit Insurance Corporation for non-insurance.

The statutory authority of the Board to prescribe conditions of membership of state banks in the Reserve System does not extend to a prohibition upon the sale of a share of stock by one of its shareholders to another person, or to the exaction of a commitment from a bank that it will withdraw from the System upon notice from the Board, hinged upon a contingency beyond the bank's control or responsibility. Such a commitment would limit membership to the Board's pleasure and is not a valid condition.

Statutory authorization for conditions of membership is measured and limited by the statutes governing qualifications of banks and enumerating the factors to be considered by the Board in admitting a bank. Authorization to consider the "general character of its management" does not extend to considering the identity of the bank's possible future shareholders.

Prior to 1927 the Federal Reserve Act had delegated to the Board general discretion to prescribe conditions of membership for applying state banks. A 1927 amendment provided that any conditions of membership must be "pursuant to" the Act. This express restriction prohibits the Board from conditioning membership upon contingencies which are beyond the bank's control, which have no relation to its condition or operations, which do not involve conformity to accepted banking standards and which are not based upon any provision of the Act. Concurrently with the amendment, the Board itself construed the Act to preclude conditions similar to Condition No. 4.

The statute does not authorize the Board to contract with applicants for admission to the Reserve System and unauthorized conditions of membership are therefore void.

The claimed authority to prescribe the condition in question here conflicts with other statutory provisions relating to (a) bank supervision, (b) the protection of banks from any unsafe and unsound practices, and (c) the furnishing of the same opportunity to "all banks" to avail themselves and their patrons of the benefits of federal legislation designed to secure sound operations.

II.

To construe the statute as authorizing the Board to expel a bank for the sole reason that a designated organization, not proscribed as a result of any proceeding against it, acquired an interest ("any interest") in its stock would render the statute unconstitutional.

III.

The soundness of the operations of the respondent bank is not affected by the character of the operations of a minority stockholder and the effort to justify the condition by an attack, unwarranted by the record, upon a proscribed minority stockholder without allegation or proof, is improper and not within the issues.

IV.

When an eligible bank becomes a member of the Federal Reserve System the relationship is mutually advantageous to the bank and to the System. The System suffers no detriment or disadvantage thereby, and the bank only obtains the privileges which the law offers all banks equally in similar circumstances. There is no basis to estop the bank from questioning the claimed authority of the Board to expel it for a reason which does not arise until long after the bank becomes a member and which, even then, does not affect its qualifications to continue as a member. Estoppel is a doctrine of equity designed to prevent injustice. It cannot be invoked in circumstances where it would operate as a substitute for undelegated administrative power nor to perpetuate unauthorized discrimination and inequality. The estoppel claimed is not based upon any misrepresentation of fact or in-

tent; and the acts relied upon to support estoppel were induced without a statement by the Board of relevant facts known to it but not known to the bank.

V.

The record shows that the condition was imposed with a serious purpose to enforce it; also, that the contingency has arisen in which enforcement within the intent has become possible. The respondent has availed itself, unsuccessfully, of its only administrative remedy and has exhausted that remedy. The requirement of any further administrative hearing, according to petitioners' own interpretation, would "emasculate the Condition." "The existence of Condition No. 4," in the language of the Court of Appeals, "does incalculable harm to the bank." Its effect is constant. In these circumstances, the remedy of declaratory judgment is appropriate.

ARGUMENT.

POINT I.

CONDITION NO. 4 IS NOT VALID.

1. The subject-matter of the Condition is not within the legislatively delegated discretion of the Board.

Petitioners concede (Br. p. 12) that the issue on the merits in this case is the "relatively narrow one: Is Condition No. 4 one which is 'pursuant' to the Federal Reserve Act?" They seem to agree also that statutory authorization for the Condition must be found, if anywhere, in one of two paragraphs of the Act: Section 9(3) (12 U.S.C. § 322), or Section 12B(g) (12 U.S.C. § 264(g)). We do not agree that the other sections of the Act may be ignored, for, as we shall point out

later, many of them are flatly inconsistent with a legislative delegation of any such power as petitioners now claim. However, before considering the other sections, we shall answer petitioners' contentions respecting the two paragraphs on which they rely. Those two paragraphs read as follows (the factors relied on by petitioners being italicized):

Federal Reserve Act, Section 9 (12 U.S.C. § 322)

"STATE BANKS AS MEMBERS

"* * *

"3. *Financial condition, management and powers*

"In acting upon such applications (i.e. for System membership) the Board of Governors of the Federal Reserve System shall consider the financial condition of the applying bank, *the general character of its management*, and whether or not the corporate powers exercised are consistent with the purposes of this Act."

Federal Reserve Act, Section 12B (12 U.S.C. § 264)

"INSURANCE OF BANK DEPOSITS

"* * *

"9. *Factors to be considered in insuring banks*

"(g) The factors to be enumerated in the certificate [of the Board] required under subsection (e) and to be considered by the board of directors [of the FDIC] under subsection (f) shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, *the general character of its management, the convenience and needs of the community to be served by the bank*, and whether or not its corporate powers are consistent with the purposes of this section."

In attempting to justify Condition No. 4 as relating to "the general character of its (the Bank's) management," petitioners argue (Br. p. 13) "that the responsibility for supplying the management of a corporation is placed by law upon its stockholders." So far, so good. But they then apparently seek to imply, without ever quite saying so, that the only effect of Condition No. 4 was to prevent Transamerica from "supplying" an improper management. It borders on the ridiculous to suggest that because Congress has wisely given the Board power to consider "the general character of the Bank's management", the Board may also regulate and prescribe specific prohibitions against the identity of the holder of one share of stock,—or even against the identity of a bank which may make a small loan upon the security of one share of stock. How far beyond the statutory limit of its authority does this administrative agency propose to go? May it prescribe prohibitions of who shall be a stockholder of a corporation which is a stockholder of a bank? May it prohibit a particular bank from lending money to a stockholder of a bank? May it prohibit a proscribed individual or corporation from being a stockholder of a bank which lends money to a stockholder of a stockholder of a bank? Surely, there must be a line drawn somewhere. We respectfully submit that Congress drew that line very clearly in the statute when it said that the Board might consider "the general character of its management", and said nothing at all about the character or identity of its stockholders.

The sincerity of petitioners' contention that the purpose of the Condition was to insure a sound management is belied by Point II of their brief (Pet. Br. p.

30), in which they claim that the interpretation placed upon the Condition by the Court of Appeals (requiring as a prerequisite to enforcement that the Board determine, after hearing, "that Transamerica's ownership of the Bank's shares has resulted in a change for the worse in the character of the Bank's personnel, in its banking policies, in the safety of its deposits or in any other substantial way") would "emasculate the Condition * * * thus stripping the Condition of its vitality."

The suggestion that the Condition relates to "the convenience and needs of the community to be served by the Bank" is apparently a new thought presented for the first time in this Court, something over five years after the Condition was imposed. It is even more ridiculous than the other suggestion. In the first place, it appears from the record that one of the items submitted by the Bank with its initial application for System membership (R. 33) was a communication from the Superintendent of Banks of the State of California under date of September 24, 1941 containing an official and unconditional finding (R. 34-35) "that the public convenience and advantage will be promoted by the establishment of a new bank in this location".

In the second place, the letter to the Bank dated March 11, 1942, which stated the Board's final additional requirements for reconsideration of the Bank's application, did not make the slightest reference to or raise any question respecting "the convenience and needs of the community to be served by the Bank".

Finally, when it is remembered that bank holding companies such as Transamerica Corporation, and

branch banking organizations such as Bank of America National Trust & Savings Association, are expressly recognized in the Federal Reserve Act and the National Bank Act as legal and proper instrumentalities to conduct the business of banking, it is absolutely absurd upon the face of it to suggest that it could make the slightest difference to the convenience and needs of the people of Lakewood Village whether a banking office in their community (the smallest bank in Los Angeles County) should have a few shares of its stock owned by Transamerica Corporation or by a customer of Bank of America.

If the Congress had intended the Board to consider the identity of present or future stockholders of an applicant for System membership, it could easily have said so. As we have seen Sections 9(3) and 12B(g) of the Act (12 U.S.C. §§ 322 and 264(g)), *supra* pp. 15-16, prescribed with considerable particularity the factors to be considered by the Board in passing upon such an application.

By the application of the doctrine *expressio unius exclusio alterius,* it would thus appear that the only factors to be taken into account by the Board in passing upon the application of a state bank for permission to become a stockholder, are the factors expressed in Sections 9(3) and 12B(g) of the Act. Consequently, since these matters to be considered have no connection, even remote, with stock ownership in the future it can be stated with conviction that the Board had no authority to consider and then impose conditions affecting possible stock ownership by a holding company at some future time.

2. The power of the Board to attach conditions to membership in the Reserve System is limited by statute and the Board has no discretion to exceed such limits. This conclusion is emphasized by the statutory history of the Federal Reserve Act.

The sole source of authority in the Board to impose any conditions upon a state bank's application for System membership is found in the following excerpt from Section 9(1) of the Act (12 U.S.C. § 321):

> "* * * The Board of Governors of the Federal Reserve System, *subject to the provisions of this Act* and to *such conditions as it may prescribe pursuant thereto* may permit the applying bank to become a stockholder of such Federal reserve bank."

Paragraph 3 of the same section (12 U.S.C. § 322) and Section 12B(g) (12 U.S.C. § 264(g)), already quoted (*supra*, p. 25), express the only factors which may be considered by the Board.

The powers of the Board and the limitations imposed thereon by Congress may be seen in better perspective if we recall the original purpose and early history of the Federal Reserve System. The System was set up for the convenience and security of *all banks*,—not the privileged few. The primary aim in reality was to promote the public welfare by "recapturing the reserves of the country, to be impounded in 12 regional banks, for commercial rather than for speculative purposes." (Senator Glass, 66 Congressional Rec., Pt. 5, p. 4436.) *All banks* were encouraged by President Wilson to become members, "to promote the national welfare" as well as their own interest. This early history and fundamental purpose are repeatedly emphasized by William P. G. Harding, a

former Governor of the Board, in his book entitled "The Formative Period of the Federal Reserve System (During the World Crisis)" (1925). At page 83, *et seq.*, Mr. Harding quotes from an illuminating letter written by President Wilson on October 13, 1917 to all non-member banks urging membership in the System and pointing out the general availability of such membership. The President is quoted as saying in part:

> "The Federal Reserve Act is the only constructive financial legislation which we have ever had which was broad enough to accomodate at the same time banks operating under powers granted by the general Government and banks whose charters are granted by the respective States. The unification of our banking system and the complete mobilization of reserves are among the fundamental principles of the Act."

He refers to then recent amendments which removed previous objections by state banks and says:

> "As the law now stands, it leaves member State bank and trust companies practically undisturbed in the exercise of all the banking powers conferred upon them by the States. The law provides also in definite terms the conditions upon which any State bank or trust company may withdraw from the System."

He then shows that some of the largest are becoming members, points to the importance of finances resting "on the firmest possible foundation" and being "adequately and completely conserved", and asks:

> "How can this necessary condition be brought about and be made permanently effective better than by the concentration of the banking strength of our country in the Federal Reserve System.
> * * *

"May I not, therefore, urge upon the officers and directors of all non-member State banks and trust companies, *which have the required amount of capital and surplus to make them eligible for membership,* to unite with the Federal Reserve System now and thereby contribute their share to the consolidated gold reserves of the country? I feel sure that as member banks they will aid to a greater degree than is possible otherwise in promoting the national welfare, and that at the same time, by securing for themselves the advantages offered by the Federal Reserve System, they will best serve their own interest and the interest of their customers."

Prior to the amendments referred to, membership was confined almost wholly to national banks and embraced considerably less than half the banking resources of the country. (Harding, "The Formative Period of the Federal Reserve System (During the World Crisis)" (1925), p. 70.) After the amendment and after the President's appeal, large and small state banks came in and the resources of the System were raised to about 70% of the whole. (Harding, *id.*, pp. 84-85.) Today it embraces about 86%.

The Congressional intent that the Board should not have authority to roam at large in the prescription of conditions has been made very clear. The Court of Appeals in the opinion now subject to review has accurately set forth the legislative history of the amendment to Section 9(1) of the Act in the following language (R. 127):

"Prior to 1927, the governing body of the Federal body of the Federal Reserve System had the very broadest power to attach conditions to a bank's entry into the System. The statutory lan-

guage [40 Stat. 233, Public Law 25, 65th Congress, approved June 21, 1917] on the subject was:

"'The Federal Reserve Board, subject to such conditions as it may prescribe, may permit the applying bank to become a stockholder.'

"At a hearing before a subcommittee of the Senate Committee on Banking and Currency in February 1926, Senator Carter Glass stated that the Federal Reserve Board (predecessors of appellees here) 'has usurped the legislative functions of Congress.' An amendment to restrict the power of the Board to impose conditions upon membership was being considered. Senator George Wharton Pepper, of Pennsylvania, who favored such an amendment said in the Senate, on February 23, 1925:

"'* * * the committee thinks that the discretion of the Federal Reserve Board in the premises should be a discretion exercised pursuant to the provisions and conditions of the act; that is, that there was no intent of Congress, when the Federal Reserve Act was passed, to create in the Federal Reserve Board a body to prescribe any kind of conditions it pleased as conditions precedent to admissibility to the Federal Reserve System, but rather to confer upon the Federal Reserve Board authority to make regulations pursuant to the Act fixing the terms upon which banks might become members of the Federal Reserve System.'

"The Board of Governors desired to retain the right to impose any conditions it chose upon membership and expressed its unqualified disapproval of the amendment proposed. Nevertheless, in 1927 the Congress amended the provision to read as follows:

"'The Board of Governors of the Federal Reserve System, subject to the provisions of this title and to such conditions as it may prescribe

> pursuant thereto, may permit the applying bank to become a stockholder of such Federal Reserve Bank.' " [44 Stat. 1229, 12 U.S.C.A. 321.]

The accuracy of the court's statement of this legislative history has not been challenged in petitioners' brief. Indeed, it could not be and would not be challenged by the petitioners because it convincingly reveals the unmistakable intention of Congress with respect to restrictions upon the power of the Board to impose conditions.

The Federal Reserve Board itself recognized the restrictive effect of this amendment by the following statement appearing in its Annual Report to Congress for the year 1927, at page 43:

> *"Conditions of membership which may be imposed on State member banks.*—The first paragraph of Section 9 of the Federal reserve act was amended by the McFadden Act so as to require that the conditions imposed by the Federal Reserve Board upon State banks admitted to membership in the Federal reserve system *shall be pursuant to the Federal reserve act."*

From the Senate Committee hearings it appeared that the amendment was occasioned by attempts of the Reserve Board, even at that early date, to prescribe conditions which the Board thought warranted. The Board had, as Senator Glass put it, "usurped the legislative functions of Congress." But the Board objected to the proposed restrictive amendment, saying:

> "* * * the board has no hesitancy in expressing its unqualified disapproval of this proposed amendment."[6]

The amendment was nevertheless adopted.

In its letter of opposition the Board had declared that it would not "prescribe any condition of membership which will * * * subject the applying bank to any greater limitations or restrictions than those under which national banks shall operate; because the Board never has and never would prescribe any such *discriminatory* condition of membership."[7]

Until this Condition No. 4 was imposed upon Peoples Bank by these petitioners Governor Platt, who had given these assurances to the committee, was never exposed as a false prophet. The possibility of such action, however, apparently was foreseen by the Congress which adopted the restrictive amendment.

It was even brought out in the course of the hearings that such a limitation was once in the law but had been omitted "inadvertently" later, according to the statement of Senator Glass, "the father of the

---

[6] See Testimony of Dr. H. P. Willis and Comments of Senator Glass thereon at pp. 123-125 of Printed Transcript of Hearings Before a Sub-committee of the Committee on Banking and Currency, United States Senate, 69th Congress, First Session, on S. 1782 and H.R. 2, Held February 16, 17, 18 and 24, 1926.

[7] See Letter Submitted by Vice Governor Edmund Platt to Chairman McFadden of the House Committee on Banking and Currency Dated February 2, 1926, quoted at pp. 38-45 of Transcript of "Hearings before a Sub-committee of the Committee on Banking and Currency, United States Senate, 69th Congress, first session, on S. 1782 and H.R. 2" held February 16, 17, 18 and 24, 1926.

Federal Reserve System". During the testimony of Dr. H. P. Willis, a noted economist, at pages 132-135 of the printed transcript the following statements were made:

> "Senator Glass: It was in the original Federal reserve act and how it got out I do not understand.
>
> "Doctor Willis: Put those words in there and it will be impossible for the Federal Reserve Board to put banks out of the system because they have branch banks."

Of course, the Board could not exclude any national bank for such a reason as was suggested by Dr. Willis; but now, twenty years later, it provides for the expulsion of a state bank for a similar reason.

The "before" and "after" history of the Board's recognition of the significance of this important amendment is indeed most revealing. Before the McFadden Act was passed in 1927 the Board itself had made it plain by its own regulation (Regulation H, Series 1924, 10 Fed. Res. Bull. (1924) 279) that it would prescribe under its then sweeping authority regulations of broad scope, and the applicable regulation included nine paragraphs descriptive of the conditions it would impose in every case. Among those conditions was the following in Section IV:

> "5. Such bank or trust company, except after applying for and receiving the permission of the Federal Reserve Board, shall not * * * directly or indirectly, through affiliated corporations or otherwise, acquire an interest in another bank in excess of 20 per cent of the capital stock of such other bank; nor directly or indirectly promote the establishment of any new bank for the purpose of acquiring such an interest in it; nor make any arrangement to acquire such an interest."

The pattern of this condition is probably the nearest approach in Federal Reserve history to Condition No. 4, but even it is not so drastic, in that it is a restraint upon the bank. This and the other proposed conditions, however, had challenged the attention of Congress (66 Congressional Record, Part 2, pp. 1463-68 (Jan. 8, 1925)) and resulted in the amendment to Section 9 which would restrict conditions of membership to those made "pursuant" to the Federal Reserve Act. It is interesting to note that the Board not only recognized the effect of the amendment as previously stated, but in its report to Congress for that year (1927) it said at page 40:

> "Section IV of this regulation (H, Series of 1924), which relates to conditions of membership prescribed by the board when it admits State banks and trust companies to the Federal reserve system, *was amended so as to conform to the first paragraph of section 9 of the Federal reserve act*, as amended by section 9 of the McFadden Act." (Fourteenth Annual Report of The Federal Reserve Board Covering Operations for the Year 1927, page 40.)

The amended Regulation H referred to (Regulation H, Series 1928, 14 Federal Reserve Bulletin (1928), page 76) omitted the fifth condition, partially quoted above, from the conditions of membership and it no longer imposed any restrictive condition with respect to "affiliated corporations"; and even with respect to an applying bank, the revised regulation carefully preserved the parity with national banks by imposing a restriction on stock purchases no broader than that applicable to national banks under 12 U.S.C. § 24 (Seventh) (prohibiting national banks from purchasing stocks).

The Board not only amended the regulation but stated that it amended it "so as to conform to the first paragraph of section 9" as the statute had recently been amended. It could have given to Congress no higher assurance than this that it conceived the omitted paragraph 5 to embrace a condition it was not authorized to impose under the amended Act and it was eliminating it pursuant to legislative compulsion. Remembering that it had resisted the amendment to the law and that it offered no other explanation for this amendment to its own regulation than conformity with the amended Section 9, the Board's action is most conclusive of its own concurrent interpretation of lack of power to impose such a condition as Condition No. 4.

The above quoted condition, now recognized by the Board as beyond its power by virtue of the 1927 amendment, is much more analogous to Condition No. 4 than any of the five illustrative conditions set forth in petitioners' brief (pp. 14-15, fn. 5). Every one of the latter was imposed with respect to a matter that the applying bank could control and they related directly to the conditions under which its own business would be transacted and its own operations pursued. In every case, in conformity with the *ejusdem generis* rule, the condition was of the same general character as those expressly set forth in the statute, and was also of the same general character as conditions 1, 2 and 3 under Regulation H. The absence from petitioners' brief of any illustrative condition of the character of Condition No. 4 serves to confirm the position taken by the Board after the 1927 amendment that it had lost the power to impose a condition of that character.

It is respectfully submitted that there could scarcely be a more perfect demonstration of both legislative intent and administrative recognition of that intent; and this Court, as did the Court of Appeals, should accept these concurring interpretations of the purpose and effect of the Act.

As further showing that Section 9(1) was never deemed by Congress to give the Board authority to impose Condition No. 4, it should be noted that in both the Banking Act of 1933 and the Banking Act of 1935, provision was made whereby it was compulsory for State banks to become members of the System by a stated time in order to retain their status as, or to become, insured banks.[8] When Congress required membership in the System to be obtained in order that the banks be continued as insured banks it did not authorize discrimination to be practiced against those which might have corporate shareholders. Stock in many such state banks throughout the country was held by corporations which either were or were capable of becoming holding company affiliates. Congress not only knew this as a matter of common knowledge, but it legislated elaborately on the subject of holding companies in the same act that created the Federal Deposit Insurance Corporation,—the Banking Act of 1933. To have excluded such banks from membership in the System and from insurance because some corporation owned a few shares of their stock

[8] The Banking Act of 1933, required all State banks to become member banks by July 1, 1936, in order to remain or become insured. Section 8, Banking Act, 1933, 12B(1)(7) (Act of June 16, 1933, c. 89, 48 Stat. 162). 12 U.S.C. § 264(y) (Act of August 23, 1935, c. 14, 49 Stat. 684) contained a similar provision which has since been repealed.

was not by the remotest inference authorized and it would have been altogether unthinkable.

Further emphasis of the Congressional intent that the Board of Governors was not to be permitted to roam at large in imposing conditions, but must look to the authority granted by the statute, is given by Sections 9(8) and 9(9) of the Act (12 U.S.C. §§ 327 and 328).[9] Section 9(8) authorizes the Board to require a forfeiture of membership on a showing "that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto", but significantly requires restoration of the erring bank to membership "upon due proof of compliance with the conditions *imposed by this section.*" Section 9(9), by the phrase "under authority of law", again negatives the existence of any "general discretion" in the Board of Governors to deprive a member bank of its privileges.

Section 9(11) of the Act (12 U.S.C. §329a)[9a] expressly gives the Board power "in its discretion", after admitting a state bank to membership with less than the ordinarily required capital, to require it to increase its capital and surplus. *Such* a condition is "subject to the provisions of the Act" and "pursuant thereto".

By Regulation H, Section 6, the Board has established three standard conditions to be attached to every permit and consequently, in fact, attached to the permit given to the plaintiff. But these standard conditions are nothing more or less than the Board's para-

[9] Appendix, pp. A-2 to A-4.

[9a] Appendix, p. A-4.

phrase of the requirements of the statute, and therefore place no restrictions upon the conduct of the member bank other than those that the statute itself requires.

In Regulation H, Section 6, the Board states that *"pursuant to the authority contained in the first paragraph of Section 9 of the Federal Reserve Act"* (12 U.S.C. § 321) "the Board * * * will prescribe the following conditions of membership for each State Bank hereafter applying for admission to the Federal Reserve System, and, in addition, such other conditions as may be considered necessary or advisable in the particular case". It cannot be consistently argued that Condition No. 4 is one of "such other conditions" which the Board believes "necessary or advisable in the particular case." The Board, in Regulation H, Section 6, quotes as the source of its authority for the regulation, the limiting language of the statute, to-wit, that the conditions must be such as "it may prescribe pursuant thereto". So the Board, in adopting the regulation clearly contemplated that these "other conditions as may be necessary or advisable in the particular case", must be conditions that are authorized by statute.

3. Any condition or regulation imposed in excess of statutory power is void. The statute does not authorize the Board of Governors to make "contracts" with applicants for admission as to the circumstances in which they will withdraw.

There is nothing unusual, as the petitioners would have the court believe, about a regulatory agency being *restricted* in the exercise of its discretion to the imposition of regulations in harmony with the statute creating the agency. As this Court said in *Manhattan*

General Equipment Company v. Commissioner, 297 U. S. 129, at p. 134:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch v. Tilden Produce Co.,* 265 U. S. 315, 320-322; *Miller v. United States,* 294 U. S. 435, 439-440, and cases cited."

The Court decided in the *Manhattan* case that the regulation in question was invalid because both inconsistent with the statute and unreasonable.

In *Waite v. Macy,* 246 U. S. 606, the plaintiff sought an injunction to prevent the appellants, as constituting the board of general appraisers known as the Tea Board, from applying to tea imported by the plaintiff tests which it was alleged were illegal and which, if applied, would lead to the exclusion of the tea. The Court found that the regulation established a ground for exclusion of the tea not recognized by the statute and therefore sustained the injunction, saying, at page 610:

> "The Secretary and the board must keep within the statute, *Merrit v. Welsh,* 104 U. S. 694, which goes to their jurisdiction, see *Interstate Commerce Commission v. Northern Pacific Ry. Co.,* 216 U. S. 538, 544 * * *"

In *Morrill v. Jones,* 106 U. S. 466, Jones sued Morrill, a collector of customs, to recover duties paid

under protest. The statute provided that animals imported for breeding purposes should be admitted free, under such regulations as the Secretary of the Treasury might prescribe. The Secretary had adopted a regulation providing that the collector should "be satisfied that the animals are of superior stock". The court held that the regulation was in excess of the power of the Secretary and invalid.

A recent reiteration by this Court of the requirement that authority for the exercise of administrative discretion be found in the governing statutes appears in *Hannegan v. Esquire, Inc.*, 327 U. S. 146. In that case the court held unauthorized an attempt by the Postmaster General to restrict the statutory classification of publications entitled to second class mailing privileges. The court did not question the good faith of the Postmaster General in establishing a "policy" which he deemed in the public interest, but it pointed out that *he* had not been given the statutory right to apply any such "policy".

Vom Baur in Vol. 1, Federal Administrative Law, § 25 (1942), states:

> "If the statute sets up standards governing the exercise of the authority conferred, the delegate cannot act validly except within those standards; and findings by the delegate as to the existence of the required basis for its action are necessary to sustain that action. Otherwise the case would still be one of an unfettered discretion, as the qualification of authority would be ineffectual."

In *International Railway Co. v. Davidson*, 257 U. S. 506, Mr. Justice Brandeis, writing for an unanimous court, upheld the sufficiency of a bill for an injunction,

restraining the imposition by the Collector of Customs of regulations going beyond the scope of the statute, in the following language (at p. 514):

> "Section 161 does not confer upon the Secretary any legislative power, *Morrill v. Jones,* 106 U. S. 466; *United States v. George,* 228 U. S. 14. A regulation to be valid must be reasonable and must be consistent with law."

The restrictions upon the exercise of administrative discretion granted by statute were well stated in the Final Report of the Attorney General's Committee on Administrative Procedure, published in 1941. At page 2 of their report they stated:

> "It is well recognized that the purpose of Congress in creating or utilizing an administrative agency is to further some public interest or policy which *it* (i.e. the Congress) has embodied in law, whether it be a unified transportation or communications system, or old-age security, or the prevention of unfair practices in competition or in labor relations. But everyone also recognizes that these public purposes are intended to be advanced with impartial justice to all private interests involved and with full recognition of the rights secured by law. Powers must be effectively exercised in the public interest, but they must not be arbitrarily exercised or exercised with partiality for some individuals and discrimination against others. Procedures must be judged by their contribution to the achievement of these ends."

Accord:

Campbell v. Galeno Chemical Co., 281 U. S. 599, at 610;

Colorado v. Toll, 268 U. S. 228;

Miller v. U. S., 294 U. S. 435;

Vom Baur, Federal Administrative Law (1942 Ed.), Vol. 1, Section 499;
Lynch v. Tilden Produce Co., 265 U. S. 315;
Koshland v. Helvering, 298 U. S. 441.

The theory of Condition No. 4 is quite peculiar. If a condition were one which the Board is authorized to attach to a permit, then upon the failure of such member bank to comply with the terms of the condition, the Board has authority to *compel* such member bank to retire from the system through the surrender of its stock, by proceeding under Section 9(8) of the Act (12 U. S. C. § 327).[10]

The very fact that the Bank was required to accept the condition and to agree to comply therewith is cogent evidence that the Board did not believe that it could impose the condition, relying solely on its own power, and make it effective. It is no part of the scheme of the statute or of the regulations that the applying member bank should be required in express terms to accept valid conditions and to agree to comply therewith. *Valid conditions are completely efficacious by virtue of their own strength,* unsupplemented by any agreement. *The statute will be searched in vain for any provision making membership in the System a subject of contract.* There are very sound reasons why this is so. Any such provision would introduce inextricable confusion and be utterly inconsistent with the equal enjoyment by all qualified banks of the advantages of membership.

It thus appears that at the very outset the Board was clear in its own mind that it had no power to impose the terms of Condition No. 4 as a *condition,*

[10] Appendix, p. A-2.

and consequently it was seeking to accomplish its unauthorized purpose by exacting from the Bank a promise to exercise a privilege that would belong to the Bank—something that the Board clearly had no right to do; also something that the board of directors of the Bank could not properly agree to in view of their constant and continuing obligations to the depositors and stockholders as well as their legal inability to bind their successors. *The statute vests the option of withdrawal in the member bank and in no one else.*

4. Not only is there no authority in the statute for Condition No. 4, but it is in direct conflict with several provisions of the statute.

(a) *Condition No. 4 is directly contrary to the stated purpose of Section 12B(y) of the Act (12 U.S.C. § 264(y)) (Federal Deposit Insurance provisions of the Federal Reserve Act.*[11] That section, which is entitled "Non-discrimination", states that the purpose of the Federal Deposit Insurance provisions is "to provide *all* banks with the same opportunity to obtain and enjoy the benefits" of Federal Deposit Insurance.

Thus, if respondent had chosen to become merely a non-member insured bank, no conditions of any kind could have been imposed lawfully upon it by the Federal Deposit Insurance Corporation. Yet, if Condition No. 4 be held valid, the respondent will be in the anomalous position of being subject, at the will of petitioners to deprivation of its status as an insured bank by being deprived of its status as a member bank, thereby depriving it of the "same opportunity

[11] Appendix, p. A-11.

to obtain and enjoy the benefits" of Federal Deposit Insurance along with "all banks". Indeed, it appears that, without advance notice to either the Bank or Transamerica Corporation, the petitioners have entered into an agreement with the Federal Deposit Insurance Corporation that the Bank will be denied Federal Deposit Insurance upon withdrawal from the Federal Reserve System (Eccles letter November 13, 1942, R. 83-84).

This is in direct conflict with Section 12B(y) which says that such discrimination shall not take place "in any manner".

(b) *Condition No. 4 runs counter to a number of provisions expressly contemplating that the stock of a state member bank may be held by a holding company.* There are so many provisions of the Act expressly contemplating that stock of a state member bank may be owned by a holding company that argument would seem unnecessary to demonstrate the propriety of such ownership. We confine ourselves, therefore, to a listing of a few of the sections of the Act containing such provisions:

§ 4(16) (12 U.S.C. § 304)—Only one bank so affiliated may vote for Federal Reserve Bank directors.

§ 9(16)(17)(18) (12 U.S.C. § 334)—Reports from a state member bank shall set forth information as to relations between such bank and its holding company affiliate.

§ 21(9) (12 U.S.C. § 486)—Waives requirement of reports respecting holding company affiliates in certain instances.

§ 9(21) (12 U.S.C. § 337)—State member bank must obtain agreement from its holding company affiliate that latter will be subject to *"the same*

conditions" as holding company affiliates of national banks and if voting permit of affiliate is revoked all affiliated member banks of such affiliate my be required to forfeit their Federal Reserve memberships.

Also prohibits affiliation with corporation engaged principally in issue or flotation of securities. Under the doctrine of *expressio unius exclusio alterius,* this would permit affiliation with other types of corporations. This is recognized by the Board and one of the chief objectives of the pending bill (S. 829), which it is sponsoring, is to amend the law in this respect.

§ 9(22) (12 U.S.C. § 338)—Holding company affiliates of state member banks are subject to examination by examiners selected by Board of Governors.

§ 23A (12 U.S.C. § 371c)—Provides limitations upon member banks making loans to affiliates or purchasing their securities or accepting such securities as collateral.

See also—Rev. Stat. § 5144, as amended by the Banking Acts of 1933 and 1935 (12 U.S.C. § 61)[12] —Holding company affiliate required to enter into certain agreements, stated in the law, in applying for a voting permit—but *not* an agreement to limit future stock acquisitions.

From these statutes at least four conclusions are apparent:

1. That a bank holding company is recognized by law as a legitimate organization which operates under the supervision of the Board.

2. That no power exists in the Board to place any restriction whatsoever on the acquisition by a holding

[12] Pet. Br., Appendix, p. 45.

company of any amount of stock in either a state member bank or a national bank.

3. That a state bank is entitled to membership in the System on the *same terms and conditions as a national bank.*

4. That any so-called "condition" of membership which would operate to remove a member bank from the System on account of a lawful acquisition of stock by any association or holding company would impose a penalty where no offense has been committed,—a penalty which is inconsistent with the rights of both the company and the bank as clearly recognized in the statutes.

In the face of all these provisions, it is clear that, as one of the "conditions * * * *pursuant thereto*" which the Board may prescribe in connection with its permit to an applying state bank, it cannot prescribe that the state bank shall not have a holding company affiliate. Congress has clearly recognized that this is beyond the control of the Board. Obviously, the greater includes the lesser, and therefore it is clear that the Board may not prescribe that if any of the stock (no matter how little) of the applying state bank shall be acquired subsequently by a holding company, the bank forfeits its rights as a member bank.

(c) *The imposition of Condition No. 4 runs squarely counter to the provision of Section 9(12) of the Act (12 U.S.C. § 330)*[13] *which guarantees to state member banks the retention of their "full charter and statutory rights."*

---

[13]Appendix, p. A-5.

One of the "charter and statutory rights" which plaintiff has as a state bank is that its stock may be held or sold by its various owners. The laws of California impose no restrictions whatsoever upon the ownership of stock of the Peoples Bank by Transamerica, or any other company. In this connection, see the illuminating interpretation of Acting Attorney General John W. Davis in 31 Opinions of the Attorneys General, 153, September 10, 1917, holding that Clayton Act restrictions upon interlocking directorates do not apply to state banks joining the Federal Reserve System. We quote two brief, but very material excerpts:

> "Unlike national banks, State banks are not compelled, but in effect are invited, to join the Federal Reserve System. In Section 9 as originally enacted *Congress specified the provisions of law to which State banks must conform as conditions of membership* including in the specification certain provisions of preexisting law. The conditions of membership for State banks having thus been specified it could be argued not without reason that if Congress had intended by section 8 of the Clayton Act to prescribe further conditions of membership it would have affirmatively expressed that intention, which it has not done * * *.
>
> "The intention of Congress, however, is not left to appear by implication alone. Section 9 as amended goes further, and by positive provision declares that State member banks shall retain their 'full charter and statutory rights' as State banks, 'subject to the provisions of this act and to the regulations of the board made pursuant thereto.' Since the rights existing under State laws as to selection of directors seem clearly among the 'charter and statutory rights' thus retained in *full* by State member banks, they must

be held free in that regard from the restrictions imposed by section 8 of the Clayton Act" (pp. 156-157).

Further, it is a "privilege", certainly, of national member banks, to have the stock thereof owned in part or in whole by a holding company. That being a privilege of a national member bank, it is, by virtue of Section 9(12), also a privilege of a state member bank.

(d) *Condition No. 4 also runs counter to the provision of Section 9(9) of the Act (12 U.S.C. § 328)*[14] *which authorizes state member banks "desiring" to withdraw from the system to do so.* Condition No. 4 is a requirement that the plaintiff bank, to quote the condition, "shall withdraw from membership", not when it so desires, not when its then board of directors finds it in its interest to do so, but, due to a condition imposed on it in May, 1942, when through some circumstance over which it has no control, to wit, the acquisition by Transamerica of some stock therein, the Board requests it to withdraw. That which is *voluntary* under the statute is sought to be made *compulsory* by the condition. "The membership of a state bank in the Federal Reserve System is * * * purely voluntary both in its inception and duration". *Fidelity-Philadelphia Trust Co. v. Hines,* 337 Pa. 48, 10 A. 2d 553 (1940).

(e) *If Condition No. 4 is an attempt to establish a method of protecting the Bank and the System against unsafe or unsound practices, it is inconsistent with the methods provided by Section 30 of the Bank-*

[14] Appendix, p. A-3.

ing Act of 1933 (12 U. S. C. § 77)[15] *and by Section 12B(i)(1) of the Federal Reserve Act (12 U. S. C. § 264(i)(1))*[16]. Section 30 of the Banking Act provides a *statutory* method for protecting a member bank against "unsafe or unsound practices" on the part of its management, viz., *removal of the offending director or officer,* and a criminal penalty *upon such director or officer* if he thereafter participates in the management. There is no attempt, as petitioners contend, to control the discretion of the stockholders in the original selection of their officers and directors. There is no provision that the identity of the stockholders themselves should be subject to the approval of the Board of Governors.

Section 12B(i)(1) of the Act provides a further statutory remedy, applicable to all member and nonmember insured banks, "whenever the board of directors (of the Federal Deposit Insurance Corporation) shall find that an insured bank or its directors or trustees have continued unsafe or unsound practices * * *." This remedy affords the bank an opportunity to correct the unsafe or unsound practices and, failing to do so, it may then have its insurance terminated, and if the bank be a member bank it will be compelled to terminate its membership in the System. There is, of course, no contention in this case, in spite of the vague references by the petitioners to "unsound policies", that any occasion has arisen for the application of this statutory remedy. To utilize Condition No. 4 in such a manner as to impose these penalties upon the respondent bank would amount to an evasion of the specific provisions applicable.

---

[15]Appendix, p. A-11.

[16]Appendix, p. A-8.

We respectfully submit that the protection provided by Congress is better calculated to accomplish the purpose of the law. In any case, it is the only method provided by law and the petitioners' method is entirely inconsistent with it.

5. Not only is the condition invalid for complete lack of authority to impose any condition of that character and for that purpose, but it is also invalid because arbitrary, unreasonable and unjust, and because it is discriminatory.

The petitioners (Br. pp. 15-18) have cited several cases to support the proposition that the courts are without authority to substitute their judgment for that of administrative agencies or officers of the Government in matters properly within the discretionary powers of such agencies. With this general proposition we have no dispute. The proposition, however, is only a general one and is subject to well-recognized exceptions. In the court below the defendants cited as an authority for this proposition the case of *Ickes v. Underwood*, 141 F. 2d 546 (App. D. C. 1944). We note that this citation has been conspicuously omitted from their present brief, doubtless because the exceptions to the rule relied upon by petitioners were so well stated in the opinion of the court (141 F. 2d, pp. 547-548), as follows:

> "The general rule is that the judicial power will not be interposed to limit or direct the exercise of discretion by public executive officers with respect to pending matters within their jurisdiction and control, *except in clear cases of illegality of action* * * *. As to what constitutes a clear case of illegality of action this court has said: (quoting from Proctor & Gamble Co. v. Coe, 96 F. 2d 518, 521, 522) '*The following tests have been used to uphold the exercise of judicial re-*

> *straint upon executive action under valid laws:* (1) Where an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government * * *; (2) where an officer attempts to enlarge his power, or to usurp power * * *; or (3) where his act is based upon a clear mistake of law * * *; (4) where the action of the officer or administrative body is clearly beyond its power and in violation of the statute * * *; (5) where an officer has acted, or threatens to act, in a capricious and arbitrary manner * * *; (6) where the act of the officer, "under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority (and) he has no power at all to do the act complained of * * *."'"

As we have previously pointed out, the imposition of Condition No. 4 by the Board brings this case within practically all of the exceptions to the rule.

The case of *Apfel v. Mellon*, 33 F. 2d 805 (App. D. C. 1929), heavily relied upon by defendants, involved an application for a writ of mandamus to compel the Federal Reserve Board to issue a permit for a corporation to engage in foreign banking. The banking statutes required the approval of the Federal Reserve Board, without setting up specific factors to be considered. The court held that the statute conferred upon the Board a discretion to grant or withhold such approval and that such discretion could not be controlled by mandamus. But, in contrast to the provisions for Federal Reserve membership and Federal Deposit Insurance, which were expressly intended to make such privileges available to all banks in the United States, the statute involved in the *Apfel* case was clearly intended to provide "a means for

conferring special and important privileges" (33 F. 2d at p. 807).

Gray v. Powell, 314 U. S. 402, held that whether or not a railroad was both a producer and consumer of coal so as to be exempt from certain provisions of the Bituminous Coal Act was a question of fact entrusted by that Act to the Director of the Bituminous Coal Commission and that where there was evidence to support the Commission's findings the court would not substitute its judgment for that of the Commission.

The other authorities relied upon by defendants in support of this proposition are of the same general character. All involved situations in which the matter in dispute was admittedly committed by law to the administrative discretion of the public official whose determination was attacked.

Adams v. Nagle, 303 U. S. 532;
Pacific States Box & Basket Company v. White, 296 U. S. 176;
Kennedy v. Gibson, 8 Wall. 498;
The Germania National Bank of New Orleans v. Case, 99 U. S. 628;
Bushnell v. Leland, 164 U. S. 684;
United States Sav. Bank v. Morgenthau, 85 F. 2d 811 (App. D. C. 1936);
Raichle v. Federal Reserve Bank of New York, 34 F. 2d 910 (C.C.A. 2d 1929).

The circumstance that the Board of Governors had some discretion as to the conditions they would impose, *within the range of their authority* with respect to the imposition of conditions, has no bearing on the question before the Court. Condition No. 4 is obviously outside of the realm of that authority and

consequently outside the realm of any discretion. It was purely arbitrary and capricious, and we have shown, page 45, *et seq., supra,* even ran counter to several express statutory provisions.

Absolutely no discretion existed in the Board either to impose or not to impose a condition such as Condition No. 4.

Any condition which the Act in its present form authorizes the Board to impose pursuant to the Act, must be a condition which the Bank has the power to perform. It must be a condition affecting the Bank's operations, with respect to the performance or non-performance of which the bank has control. In fact, all the statutory provisions governing membership refer to the applying *bank* and to things which it must do, and not to its stockholders. To subject the Bank to a condition which might deprive it of its membership in the System and of its status as an insured bank for an innocent and lawful act of a stockholder over which it has no control whatsoever, could never have been contemplated by Congress. We repeat, that the condition is arbitrary, unreasonable, unjust, and, we say, vicious.

This point is well sustained in *Manhattan General Equipment Company v. Commissioner,* 297 U. S. 129, *supra,* p. 41. The Court said, at p. 134:

> "And not only must a regulation, in order to be valid, be consistent with the statute, *but it must be reasonable. International Railway Company v. Davidson,* 257 U. S. 506, 514."

Accord

International Ry. Co. v. Davidson, 257 U. S. 506;

Nolan v. Morgan, 69 F. 2d 471 (C.C.A. 7th, 1934).

See also

Vom Baur, Federal Administrative Law (1942), Vol. 1, Section 500.

Nor can a regulation be discriminatory.

Bailey v. Holland, 126 F. 2d 317, 322 (C.C.A. 4th, 1942).

The Board therefore has no right to prescribe that the Peoples Bank shall be required to surrender its stock and cease to be a member in the event that a particular holding company, or any holding company, should acquire an interest therein, there being no similar power with respect to national banks. It does not even have power to make the same prescription with respect to *every* existing state member bank or applying state bank and as affecting *every* possible holding company through loans or otherwise. The right to discriminate in this situation would be an intolerable tyranny.

Transamerica owns sufficient stock in several member banks, both state and national, to make it a holding company affiliate of such banks and it has minority interests in other member banks, including Bank of America. None of them has been afflicted with a Condition No. 4 (R. 65). Another bank holding company, by way of example, owns the controlling stock of 80 or more banks and trust companies. Of the state banks owned by that corporation, several are members of the System, and we make bold to assert that no such condition as Condition No. 4, in any manner, shape or form, was attached to the admission of these state banks into the System (See R. 104-105). As

further proof of the arbitrary and discriminatory character of this condition, we have shown that four other California state banks have been admitted to membership subsequent to the imposition of Condition No. 4 on the respondent bank,—all of them presumably without any such condition. The absence of such condition is quite clear in the case of the Napa Bank of Commerce, the first bank in California admitted after the admission of Peoples Bank, as it is public knowledge that such bank has recently been absorbed by the American Trust Company of San Francisco, a state member bank, and that said Trust Company has been authorized by the Board to operate a branch at the location of said bank (R. 105-106). Thus we have the positive blessing of the petitioners bestowed upon a competitor of the respondent Bank and a competitor of Bank of America, while the latter are subjected to petitioners' threats and condemnation.

POINT II.

IF THE STATUTE HAD AUTHORIZED THE BOARD TO PRESCRIBE CONDITION NO. 4, IT WOULD BE AN UNCONSTITUTIONAL DELEGATION OF THE LEGISLATIVE POWER VESTED IN CONGRESS ALONE UNDER SECTIONS 1 AND 8 OF ARTICLE I OF THE CONSTITUTION. SUCH EXERCISE OF POWER BY THE PETITIONERS IS ITSELF A VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

We do not elaborate our constitutional argument, inasmuch as the petitioners have repeatedly admitted in their annual report (R. 96) and in their testimony before Congressional Committees (R. 97-100, 101-103) that they do not have any power, under their own interpretation of the statute, to impose any such restriction upon bank holding companies as was attempted by the prescription of Condition No. 4.

It is an elementary principle of statutory construction that a statute should be construed, if possible, in such a manner as to avoid any conflict with the constitution.

See

Panama R. Co. v. Johnson, 264 U. S. 375;
Lewellyn v. Frick, 268 U. S. 238;
Hassett v. Welch, 303 U. S. 303.

We submit that it is too clear for argument that Congress itself has no power to establish Condition No. 4 by direct legislation. It can, of course, say that no bank shall be a member of the Federal Reserve System whose stock is held by a holding company, but it cannot pick out one bank and say to that bank alone that it shall not be admitted nor retained as a member if any of its stock is held by a holding company, while all other similarly situated banks may be admitted or retained. Nor can Congress by legislation expressly discriminate against any particular holding company as a holder of stock in a member bank or against a particular bank like the Bank of America, acquiring an interest through commercial loans or otherwise in a member bank, for Congress itself would have to make its legislation applicable to all institutions that were in the same situation.

A fortiori, if Congress itself could not legislate the condition, it could not delegate to an administrative board like the Board of Governors any express authority or any discretionary authority enabling it to impose such a discriminatory condition. The respondent invokes the protection of the constitutional provisions referred to herein and specified in its complaint.

Schechter v. United States, 295 U. S. 495;
Panama Refining Co. v. Ryan, 293 U. S. 388.

POINT III.

NEITHER UNSOUND BANKING POLICIES NOR VIOLATIONS OF THE ANTI-TRUST LAWS HAVE BEEN ALLEGED OR PROVED. THE RECORD CLEARLY SHOWS THAT NONE OF THESE ELEMENTS IS PRESENT.

In all courts before which arguments have been presented in this case, the Petitioners have attempted to surround Condition No. 4 with an aura of justification based upon the theory that there is something "unsound" about Transamerica Corporation. Petitioners' brief in this Court presents the same thesis and adds to it the suggestion that Condition No. 4 is necessary to discharge Petitioners' responsibility under the Clayton Act (Pet. Br. pp. 10, 20, 22, 23-29).

Even if there were merit in these contentions, which we shall shortly demonstrate there is not, the Petitioners' assertion of high minded motives does not justify their illegal action. To warrant a reversal of the decision below, petitioners must successfully challenge the conclusion of law stated in the court's opinion as follows (R. 126):

> "The broad discretion confided to the Board of Governors continues only so long as it acts within its statutory scope. When the Board reaches the border of the Federal Reserve Act it must stop, for to go beyond would be to impinge on Congressional prerogatives."

Because of the loose habit into which the petitioners have fallen of using the words "unsound" and "against the public interest" as applied to Transamerica Corporation, without specifying what they mean, we feel impelled to point out the true facts upon which such irresponsible and groundless charges are based. The situation was well summarized in the opinion of the Court below as follows (R. 124-125):

> "This striking denunciation of Transamerica makes pertinent an inquiry into the nature of that organization. The record discloses it to be a large corporation, owning extensive interests in many banks and in other corporations as well. It is a substantial stockholder in the Bank of America, which for several years has been one of the two or three largest banks in the Nation. The financial soundness of Transamerica is not challenged. The character, integrity and ability of its management are not assailed. No statute, state or federal, forbids it to own shares of the Peoples Bank or any other bank.
>
> "The basis for the imposition of this unusual and unqualified prohibition against Transamerica's acquiring shares of the bank in question is shown by the record to be the fact that for some time federal bank regulatory authorities, including the Board, have regarded further expansion of Transamerica as undesirable and unsound."

There is nothing in petitioners' charge to support the apparently desired inference that there is something "unsound" about the financial condition of any bank in which Transamerica Corporation is interested or about the banking policies of any such bank. Indeed, it is a matter of common knowledge that Bank of America, in which Transamerica has a substantial, although minority (approximately 25%) interest, is now the largest and generally recognized as one of the best managed banks in the United States. As pointed out in the opinion of the Court below, that Bank "for several years has been one of the two or three largest banks in the nation" (R. 124-125). But Transamerica itself is not a bank and does not have any banking policies. It is a bank holding company holding a general voting permit from the Board (R. 104) and as such it is under full legal supervision of the Board.

If there is anything wrong with Transamerica's so-called financial policies, this respondent bank cannot understand why it (not even an affiliate of Transamerica) rather than Transamerica or some bank which Transamerica controls, should be the one exposed to penalty. Certainly, the statutory obligation to protect the System against "unsound policies" of any other corporation subject to the regulatory jurisdiction of the Board is *upon the Board*, and not upon this respondent. Respondent recognizes that *it* must maintain sound management and sound banking policies, but forfeiture of membership or other penalties can only be imposed for failure to correct specific situations (See Banking Act of 1933, §30, 12 U.S.C. §77; Fed. Res. Act §12 B (i). (1), 12 U.S.C. §264 (i) (1)).[17]

Petitioners now claim (Pet. Br. p. 10) that the Board "had reason to believe that respondent was already under, or was about to come under, the control of Transamerica", and the Board might have been concerned respecting "respondent's welfare or that of the Federal Reserve System" if there should be domination by Transamerica's management. The Court below has found (R. 125) that:

> "The fact is, however, that the record does not show that the Board had reason to believe that appellant, at the time its application was filed, was under or was about to come under the management of Transamerica."

And there are now no *ifs* to the purported applicability of this Condition under altogether different facts. The facts show that Transamerica *has not* ob-

[17] Appendix, pp. A-8 to A-12.

tained control and that the Condition before the Court contemplates that the respondent bank forfeit its membership at the option of the petitioners even if Transamerica or any other holding company should acquire a small minority of its stock. Control is not at all involved or necessary to invoke this forfeiture condition. Much less is management involved. As we have seen, the petitioners take strong exception to the suggestion in the opinion below that a hearing should even be required as to any change in the condition of the respondent bank before the forfeiture is invoked. Yet this "Sword of Damocles" continues suspended.

The suggestion that Transamerica or Bank of America ownership of "any interest" in the respondent bank might create a danger to respondent or to the Federal Reserve System or to Federal Deposit Insurance Corporation, or that petitioners might ever have thought that such a danger might be so created, is completely inconsistent with this record, which shows not only that Transamerica influence through stock ownership has contributed to the development of the leading bank in the United States but also that no bank in which Transamerica has ever had any substantial interest has failed to meet in full all of its obligations (R. 76-79; 92-95).

Indeed, the only basis shown by the record for the petitioners' use of the word "unsound" as applied to anything connected with Transamerica Corporation, appears in the testimony of the petitioner, Eccles, before a committee of Congress, in the course of which he expressed the personal opinion that a bank holding company should not be permitted to invest in bank stocks and in stocks of other industries at the same time and commented that he would regard such a

practice as "unsound"—but even he recognized that the law permits it (R. 98-100), and we note and the record shows that thus far his personal opinion has not been expressed in any legal enactment (R. 68). It would appear that the Congress has adhered to the view that diversification of investments lends strength to a bank holding company and so puts it in a *better* position to assist its bank affiliates in times of bank crises than it would occupy if, above the statutory minimum reserve, it owned nothing but bank stock.

As we have pointed out in subdivision 4(e) of Point I of this brief (*supra*, pp. 50 to 52), there are two specific and adequate methods of protecting the Bank and the System against "unsafe and unsound practices", and both conflict with the one contemplated by Condition No. 4. However, since petitioners have adopted the word "unsound" as their principal justification for Condition No. 4, it is interesting to note the sort of conduct which has been treated as "unsound" in the application of the statutory procedure. This information is readily available in the published official reports of the Federal Deposit Insurance Corporation.[18]

It will be noted that there are listed 54 types of practices or violations within the scope of this disciplinary statute, embracing every type of operation constituting a hazard to soundness. In the eleven years experience under this provision of the law, however, its administrators have apparently never once considered that the soundness of a bank's operations was

[18]Five pages of tables from such reports, reflecting the use of the statutory procedure over a period of eleven years and covering 132 banks, are reproduced for the convenience of the Court at the back of the Appendix to this brief.

affected by the fact that there was a change in the ownership of some of its stock or that some of its stock had been transferred to a stockholder having other interests than banking.

Apart from their alleged desire to protect *the System* from the consequences of the Bank "coming under the domination of a management which the Board considers inimical to respondent's welfare", petitioners go so far in their brief as to suggest that a proper purpose of the Condition was "to protect *respondent*" from such consequences (Pet. Br. p. 10). When it is remembered that the only act within the Bank's power, which would constitute compliance with Condition No. 4, was the act of *withdrawing* from the System, thereby losing its power to perform its statutory functions as a result of losing its Federal Deposit Insurance permanently (through secret agreement between the Board and the F. D. I. C.), the "protection" afforded to the Bank would be analogous to the elimination of disease from a patient by a doctor whose treatment results in the patient's death.

The suggestion that Condition No. 4 was in some way related to a responsibility of the petitioners under the Clayton Act" to carry out a national policy against restraint of commerce and monopolies" (Pet. Br. p. 10), is equally absurd. Petitioners did not see fit to put any facts into the record upon which such an argument might be based but have preferred to set forth a table (Pet. Br. p. 25) taken from the speech of a Congressman reported in the Congressional Record. The table purports to set forth some very general statistics as of December 31, 1943, about two years after the date when the application of Peoples Bank was under consideration by the Board, respecting "Banks and branches in the Transamerica Corpora-

tion group". It does not distinguish between banks *controlled* by Transamerica and those in which Transamerica had only a minority interest. It also does not show the sources of the information.

In case this Court should be interested in some accurate facts and figures respecting the subject matter so discussed in the petitioners' brief, we have set forth in the Appendix to this brief certain data obtained from published sources, the accuracy of which is so generally recognized that it may with propriety be judicially noticed by the Court, indicating the actual competitive situation as of the end of the year 1942, in Los Angeles County in which this respondent bank's office had been opened for business that year.[19] These data show that, in Los Angeles County, respondent was the smallest in terms of deposits and one of the smallest in terms of capital among 36 banks, maintaining a total of 205 banking offices, *in which Transamerica Corporation did not have any interest.* They show in contrast that Transamerica Corporation did have some interest in four banks in Los Angeles County and that all but four of the banking offices in which it had an interest, by way of stock ownership, were branches of Bank of America in which Transamerica's stock interest was about 25%. These statistics further indicate that approximately 35% of the banking deposits and 42% of the banking offices in Los Angeles County were in banks (including Bank of America) in which Transamerica had some stock interest, while approximately 65% of the deposits and 58% of the banking offices were in banks in which Transamerica did not have any interest. They further

[19]Rand McNally Bankers Directory, First Ed. 1943; Moody's Manual of Investments, 1943; Walker's Manual of Pacific Coast Securities, 1943 Ed.; Appendix, pp. A-20 to A-21.

show that approximately 97% of the deposits and banking offices in which Transamerica had a stock interest in Los Angeles County were in Bank of America, in which that interest, as previously stated, is only about 25%. In the face of these statistics, the suggestion that the Board thought it necessary to prevent the acquisition of "any interest" in even one share of the stock of the smallest bank in Los Angeles County by Transamerica Corporation in order to prevent "substantially lessened competition" or the creation of "monopoly" (Pet. Br. p. 29) may well be left without further comment.

However, we must again point out that even if some action by the proper authority under the anti-trust laws were appropriate, in spite of the facts and figures referred to, that action should not be taken by the Board against this respondent bank, which is not even alleged to be guilty of violating the anti-trust laws. In a proceeding under the anti-trust laws, the only consequence to respondent bank would be a requirement that some purchaser of its shares divest itself of such ownership,—a far cry indeed from the death sentence upon the Bank which the petitioners, without any hearing on their feigned monopoly issue, would impose pursuant to Condition No. 4.

The petitioners' argument (Br. pp. 26-27), based upon the claimed analogy between the powers of the Federal Communications Commission to make regulations under the Federal Communications Act and the powers of the Board to prescribe conditions upon state banks will be found, upon comparison of the statutes, to be altogether unfounded. The Federal Reserve Act extends to all sound state banks the privilege of joining the Federal Reserve System on an equal basis with all national banks. In contrast, the court in *National*

Broadcasting Co. v. United States, 319 U.S. 190, exhaustively reviewed both the Communications Act and the extensive hearings conducted by the Commission under that act preliminary to the promulgation of the regulations there in question. It found many express provisions in the statute giving the Commission authority, in licensing, to provide communities with a "fair, efficient, and equitable distribution of radio service" and to make "special regulations applicable to radio stations engaged in chain broadcasting" (pp. 215, 217).

POINT IV.

THERE IS NO BASIS FOR ANY CLAIM OF ESTOPPEL IN THIS CASE.

In considering the petitioners' claim of estoppel we must assume the illegality of Condition No. 4. If the Act gives the petitioners authority to impose a condition such as Condition No. 4, then it is binding without regard to estoppel, but if, as we believe we have demonstrated, the imposition of the Condition was beyond the statutory authority of the Board, then the petitioners urge this Court to uphold their usurpation of the Congressionally withheld authority because of the respondent bank's initial acquiescence. In other words, petitioners would have this Court declare that a responsible government agency may derive powers of life or death over a citizen, without authorization from Congress, if the citizen once acquiesces in the theory, asserted by the government agency, that it has such power.

We respectfully submit, and the court below has held that such a rule would constitute an unsound perversion of the doctrine of equitable estoppel.

This record is barren of any of the essential elements of estoppel. A leading text writer (3 Pomeroy, Equity Jurisprudence (5th ed. 1941) §805) lists six "essential elements which must enter into and form a part of an equitable estoppel in all of its phases and applications". The most important of these are "1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. * * * 6. He (i. e., the party to whom the representation is made) must in fact act upon it in such manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it".

Thus, without a misrepresentation or without detrimental reliance, application of a doctrine of equitable estoppel is untenable. See *Ketchum v. Duncan,* 96 U. S. 659, 666; *Hammond v. Tate,* 83 F. 2d 69, 72 (C.C.A. 10th, 1936). We have already pointed out the absence of any misrepresentation by the respondent bank, or anyone in its behalf, in connection with its application for the System membership upon which Condition No. 4 was imposed by the Board. We have also pointed out (*supra,* p. 31) that President Wilson and the Congress, which created the Federal Reserve System, did not attempt to set up the Board "as a dispenser of federal privileges in the banking field" (See Pet. Br. p. 26) but intended and prescribed that *all banks,* which could meet the minimum requirements of eligibility prescribed in the statute, should be invited to join the System in order to promote "the national welfare". In these circumstances it is

difficult to see where there was either "misrepresentation" or "detriment".

And since it is undisputed that the Bank was and is qualified for membership in the System (Compl. par. V, R. 3, not denied by answer), and that in considering and approving plaintiff's application the Board of Governors took into consideration all factors prescribed by statute (Compl. par. VII, R. 4, not denied by answer), it cannot be seriously suggested that the petitioners or the Board have suffered or can suffer a legal or equitable detriment by being compelled to recognize that which it is their duty under the law to recognize. The conclusion that equitable estoppel has no application in such circumstances is so abundantly supported by authority that it can hardly be necessary to set forth more than a few references. For example:

> "* * * The doctrine of estoppel has no application in cases where the representations or conduct which are claimed to give rise to it tend only to induce the party to do some act which he is already legally bound to do."
>
> 31 Corpus Juris Secundum (1942), Estoppel, §72, p. 276.

> "The cases all agree there can be no estoppel, unless the party who alleges it relied upon the representation, was induced to act by it, and thus relying and induced, did take some action.
>
> "Finally this action must be of such a nature that it would have altered the *legal* position of the party for the worse, unless the estoppel is enforced."
>
> 3 Pomeroy, Equity Jurisprudence (5th ed. 1941), §812 (citing numerous cases).

"Estoppel does not arise where the person accepting the benefits is entitled thereto, regardless of the questioned transaction."

Grand Trunk Western R. Co. v. H. W. Nelson Co., Inc., 116 F. 2d 823, 836 (C.C.A., 6th, 1941).

The nearest approach to an estoppel doctrine in the facts of this case is a so-called "promissory estoppel" although that term has not been used by the petitioners. Promissory estoppel is the principle by which courts have upheld the validity of certain types of contracts without proof of consideration in the conventional sense. Indeed, in such cases the detrimental reliance by one party upon the promise of the other party has been said to operate as a "substitute for consideration" or as "the equivalent of consideration". *Allegheny College v. National Chautauqua County Bank*, 246 N. Y. 369, 159 N. E. 173 (1927). "The gratuitous promises will thus be converted into valid and enforceable contracts." *School District v. Sheidley (School District v. Stocking)*, 138 Mo. 672, 40 S. W. 656 (1897).

Illustrations of the situations to which this doctrine has been applied are:

Charitable subscriptions, which have been held enforceable, in spite of the original absence of consideration, if money has been extended or liabilities have been incurred in a reliance upon the promise so that non-fulfillment will cause injury to the payee.

Robinson v. Nutt, 185 Mass. 345, 70 N. E. 198 (1904);

University of Pennsylvania v. Coxe, 277 Pa. 512, 121 Atl. 314 (1923);

Board of Home Missions v. Manley, 129 Cal. App. 541, 19 Pac. 2d 21 (1933).

A promise not to take advantage of a statute of limitations which induces another to forego his rights and to delay suit until after the expiration of the period of limitation is held to estop the promisor from asserting the statute as a bar to the creditor's action.

Schroeder v. Young, 161 U. S. 334;

Chesapeake & N. Ry. Co. v. Speakman, 114 Ky. 628, 71 S. W. 633 (1903);

W. B. Saunders Co. v. Galbraith, 40 Ohio App. 155, 178 N. E. 34 (1931).

The essential basis for the doctrine of promissory estoppel is the avoidance of "injustice". As stated by 1 Williston, Contracts (Rev. Ed. 1936), p. 502, §139:

"There would seem, however, compelling reasons of justice for enforcing promises, where injustice cannot be otherwise avoided, when they have led the promisee to incur any substantial detriment on the faith of them, not only when the promisor intended, but also when he should reasonably have expected such detriment would be incurred, though he did not request it as an exchange for his promise."

The real basis of the doctrine was well stated by the California court in *Bank of America v. Pacific Ready-Cut Homes, Inc.*, 122 Cal. App. 554, 10 Pac. 2d 478 (1932), where it was stated (10 Pac. 2d at 482):

"It is the general rule that, in order to work out estoppel by representations, the representations must be as to facts either past or present and not as to promises concerning the future. *Promises as to future conduct or performance, if binding at all, must be binding as contracts.*"

The so-called "estoppel" defense then proves to be not a defense of "estoppel" at all. Its sole support is the admitted acceptance of Condition No. 4 by the Bank. The Bank agreed to the condition, of course. But that did not create an "estoppel". The most that could be said is that a contract resulted, which the courts are asked, in effect, to enforce specifically regardless of the lack of power to enter into it and regardless of its wholly inequitable and discriminatory consequences.

Thus we are brought right back to the basic questions: Do we have the elements of an enforceable contract? Did the petitioners have power to exact such a contract? Did the Bank have power to make such a contract validly? Will it avoid, or promote, "injustice" to compel the Bank to give up a valuable status for which it is admitted to be fully qualified and eligible?

The "estoppel" argument has not advanced us one inch toward the answers to those questions. It has merely distracted the court's attention temporarily from the real problem of illegality.

The learned Court of Appeals in the opinion now subject to review recognized the soundness of these arguments and at the same time distinguished the authorities relied upon at pages 36-40 of petitioners' brief in the following language (R. 132):

> "Obviously the principle announced in these two cases, which is the same rule found in the other Supreme Court decisions cited by the appellees, does not apply where the litigant charges that the administrative body has exceeded the authority conferred upon it by a statute, but does not attack the validity of the statute.

> "Whether estoppel has arisen, whether waiver has occurred, depends entirely upon whether Condition No. 4 is valid or invalid. No administrative body has authority to contract with a regulated corporation in a manner contrary to the statute which is being administered, nor in a way which does not give effect to the intent of Congress. The regulated corporation, by accepting such an invalid condition imposed by a regulatory authority, does not thereby waive the right to rely on the statute, and the right later to denounce the provision which contravenes it."

As the court below realized, we are not here seeking to question the constitutionality of the Federal Reserve Act. We seek to have the Act administered and applied as written. It is our specific contention that the imposition of Condition No. 4 was unwarranted by the statute and constituted an unauthorized assumption of power by the Board. It is only the latter that we wish to avoid.

The case of *United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 282 U. S. 311, seems to bear the closest analogy to the situation involved in this case. The *St. Paul* case involved the validity of a condition imposed by the Interstate Commerce Commission incidental to the authority granted by it to the railroad company to issue securities to take over the assets of a corporation in receivership. The condition attempted to control the disbursement of reorganization expenses incurred by the old corporation in connection with the reorganization plan. The particular condition was held to be beyond the power of the Commission to impose, since it did not relate to the regulation of commerce. The government contended that since the railroad company had accepted the grant of

authority to issue securities and had acted upon that grant, it could not question the validity of a condition which was a part of the grant. This Court, however, held otherwise and set aside the condition as invalid and enjoined its enforcement. In connection with the validity of the condition, the court used the following language which is particularly pertinent to this case (282 U. S. at p. 324):

> "By subdivision (3) of §20a the commission is empowered to make its grant of authority to issue securities upon such conditions as the commission may deem necessary or appropriate in the premises. The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard, Union Bridge Co. v. United States, 204 U. S. 364, 384-385) unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the act relating to such securities."

The government's contention that the condition, though invalid, could not be set aside because the grant had been accepted and acted upon, is strikingly similar to the claim of estoppel asserted by the defendants here and was disposed of in the following language by the court in the *St. Paul* case (282 U. S. at p. 328):

> "The contention of the government is that the authority to enjoin an order in part, applies to a severable part of the order, but not to a condition upon which the order was issued after the carrier has exercised the authority granted by the order. No pertinent authority is cited in support of this contention, and none has been called to our attention. *A condition contained in the order by which*

the grant is limited is as much a part of the order as any of its substantive provisions, and if beyond the jurisdiction of the commission is not ratified by an acceptance of the valid part of the order. It long has been settled in this court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. *The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant."*

We have been unable to discover any case in which the holding in the *St. Paul* case, to the effect that the acceptance of a grant does not preclude the grantee from attacking the validity of conditions attached to the grant, has been criticized or questioned. There appears to be no later authority either for or against that proposition. The *St. Paul* decision is the only authority, as to the effect of an invalid condition upon an order to which it is attached, cited by Pike & Fischer in their currently revised reference work, Administrative Law, Vol. 2, page 136.

There was in the *St. Paul* case a dissenting opinion by Mr. Justice Stone, from which petitioners have quoted (Pet. Br. p. 37, fn. 18); but a reading of it will show that the instant case is not even within the principles of the dissent. Justice Stone says (282 U. S., at p. 341):

"If appellee were unable or unwilling to comply with the order as made, equity and good conscience required, at least, either disclosure of that fact to the District Court before securing the transfer of the railroad property to it; * * * or *prompt initiation of the present proceedings to test the validity of the order* before a situation had been created

prejudicial to the public interest and to the Commission's performance of its duties."

That is exactly what the Bank in the instant case did. As soon as the Bank learned that a situation had been created by these petitioners, whereby compliance by it with the invalid condition would have a ruinous effect upon its business, because of a non-insurance commitment previously unknown to it but known to the petitioners and because the condition involved a "policy" which the petitioners later admitted they had no power to enforce, it promptly brought proceedings to have its invalidity determined. Up to that time, and even much later, there had been no possible prejudice suffered by the Board or the System (See Board resolution Jan. 28, 1946, R. 11) and the existing membership continued to be mutually advantageous. In no view of the law applicable in the instant case, therefore, can it be said that there was any failure on the part of the Bank to conform to "elementary standards of fairness and good conscience" (Stone, J., 282 U. S., at p. 342).

The dissent also objected that the judgment "precludes any future action by the Commission in the performance of its statutory duty" (282 U. S., at p. 343). Not so in the case at bar, for the Bank would be subject to every law and regulation applicable to it and to all other banks and to all powers conferred upon the Board.

Closely analogous also are the numerous decisions of this Court that a foreign corporation, by seeking and receiving authority to do business in a state, is not thereby estopped from attacking provisions of the state statutes which impose conditions on the right of foreign corporations to do business and which are

invalid because they are repugnant to the provisions of the Constitution of the United States.

Western Union Telegraph Co. v. Kansas, 216 U.S. 1;

Terrall v. Burke Construction Co., 257 U.S. 529;

Fidelity & Deposit Co. v. Tafoya, 270 U.S. 426;

Frost Trucking Co. v. Railroad Commission, 271 U.S. 583;

Hanover Fire Insurance Co. v. Harding; 272 U.S. 494.

This principle is clearly stated in the leading case of *W. W. Cargill Co. v. Minnesota,* 180 U.S. 452, at page 468, as follows:

> "The defendant however insists that some of the provisions of the statute are in violation of the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the same words of the statute) 'thereby to have agreed to comply with the same.' § 1. The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute or with any regulations prescribed by the state Railroad and Warehouse Commission that are repugnant to the Constitution of the United States."

These cases stand unchallenged today.

In addition to repeating the citations of the cases which were distinguished in the opinion of the court below petitioners have also relied upon the recent decision of this Court in *Fahey v. Mallonee,* 332 U.S. 245. But that case, like the others relied upon by the petitioners, involved a regulation plainly within the

statutory authority of the administrative agency in question. By petitioners' own statement (Br. p. 38) there was an effort to challenge "the validity of this section".

In contrast this Bank attacks the *illegality of the action of appointed government officials* who have imposed a condition which is contrary to the provisions of the applicable statute. The validity of the statute is not questioned in this case.

Petitioners also rely strongly upon the decision of the First Circuit Court of Appeals in *White Star Bus Line, Inc. v. People of Puerto Rico,* 75 F. 2d 889 (1935), with the opinion in which petitioners say "the court below seemingly disagrees (R. 132)" (Pet. Br., p. 40). Although it may be fair to say that the court below disagreed with the dictum of the First Circuit in that case, certainly it is not necessary to disagree with the holding. That case involved a bus franchise which was held by the court to partake of the nature of a contract between the grantee and the grantor. One who has obtained advantages in this bargaining process may well be precluded from questioning the authority or power of the other contracting party respecting particular items. As is pointed out earlier in this brief, however, there is no statutory provision anywhere for *contracts* with respect to Federal Reserve membership. Such is contrary to the whole scheme of the Federal Reserve Act. Congress has set the pattern and declared all eligible banks to be entitled to membership.

The facts do not support estoppel.

It is undisputed *now* that these petitioners have entered into an agreement with the Federal Deposit

Insurance Corporation respecting the "policy" which resulted in the prescription of Condition No. 4 (R. 63-67, 69-70, 72-73, 82-85). It is equally undisputed *now* that in the process of developing this "policy" the Federal Deposit Insurance Corporation indicated to the petitioners "its unwillingness under existing circumstances to insure * * * any bank in the (Transamerica) group which may withdraw from the Federal Reserve System" (R. 84).

Yet it appears that *at the time when Condition No. 4 was imposed* upon the Bank the petitioners did not disclose to the Bank and the Bank was not aware of this secret agreement which would have the necessary effect of depriving the Bank *permanently* not merely of its Federal Reserve membership but also of its federal deposit insurance in the event that Condition No. 4 should ever be enforced (R. 31-32, 49-50, 53-54, 58-61, 61-62, 62-68, 82-85). It definitely appears that the Bank was not informed of this most important incident of Condition No. 4 until March 24, 1944, nearly two years after its admission to membership in the System and that the Bank immediately authorized the institution of legal proceedings to determine the legal effect of the condition and has been protesting against the condition with all the vigor at its command ever since (R. 31-32). It is also undisputed that Transamerica Corporation protested against the petitioners' "policy" announcement of February 14, 1942 immediately after its receipt (R. 64, 70-72). In Mr. Andrews' letter to the Board of Governors dated March 17, 1942, he stated in part "it (Transamerica) cannot, on the basis of its present understanding of the statutes, accept such a ruling on behalf of itself *or any bank in which it owns any interest.*" (R. 71.)

It would be stretching the doctrine of estoppel to unprecedented length to hold that the Bank is legally barred from protesting against the invalidity of a condition which, without its knowledge, was to operate as a part of an uncommunicated agreement with third parties to deprive the Bank of federal deposit insurance,—*an agreement which remained unknown to the Bank for two years after it is alleged to have waived the right to object to it.*

Even in a situation where "estoppel" can be created by agreement (which we have previously shown cannot be done where the party seeking the benefit of the estoppel is a public official attempting to enforce regulations or conditions unauthorized by his statutory authority), it is established that there can be no estoppel in the absence of a meeting of the minds of the parties upon all the relevant facts. See: *Leathem Smith-Putnam Nav. Co. v. National Union Fire Ins. Co.*, 96 F.2d 923, 928 (C.C.A. 7th, 1938).

Equitable estoppel is at most an instrument for the avoidance of injustice. It cannot properly be invoked to perpetuate injustice. *American Law Institute, Restatement of the Law of Contracts* (1932), p. 110, § 90.

POINT V.

THERE IS NOTHING EITHER HYPOTHETICAL OR PREMATURE ABOUT THE RESPONDENT BANK'S RESORT IN THIS PROCEEDING TO ITS ONLY AVAILABLE DAY IN COURT FOR JUDICIAL REVIEW OF AN ILLEGAL ADMINISTRATIVE DEATH SENTENCE.

Keeping in mind the real nature of the controversy, and laying aside controversies feigned by the petitioners, the carefully reasoned and exhaustive

opinion of Justice Holtzoff in the District Court (R. 11-23) clearly demonstrates that the case is justiciable. The petitioners, however, have repeated their twice overruled contention of non-justiciability as the last point of their brief in this Court (Pet. Br. pp. 40-41).

The principal authority relied upon by petitioners in this connection is *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, which is cited for the proposition that the pronouncements, policies and programs of administrative agencies do not give rise in themselves to justiciable controveries *except* as they have "fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." We do not disagree with counsel's statement of this general principle, but we respectfully direct the attention of the court to the sentence in its opinion in the *Ashwander* case which immediately preceded that quoted by petitioners. In defining "the scope of the issue", this Court there said (297 U. S. at p. 324):

> "We agree with the Circuit Court of Appeals that the question to be determined is limited to the validity of the contract of January 4, 1934."

That contract was regarded by the court as action of a concrete character which constituted an actual or threatened interference with the rights of the person complaining and was examined as such. It is, however, no more definite or concrete as applied to the persons seeking declaratory relief in that case than Condition No. 4 is definite and concrete as applied to the respondent in the instant case. The court in the *Ashwander* case in determining the validity of the contract went to greater lengths than it is necessary

to go in this case and ruled on the constitutionality of the act pursuant to which the contract was made, whereas here the invalidity of the condition may be determined by examining the statutory powers of the Board. The case is clear and strong authority in support of our contention that a justiciable controversy is presented.

As pointed out by the court in *Redlands Foothill Groves v. Jacobs,* 30 F. Supp. 995 (S.D. Cal. 1940) at p. 1008:

> "* * * I can conceive no good reason for not relieving a citizen of a threat of official action resulting from his relation to a governmental agency.
>
> "A declaration of non-liability as applied to such a relationship is, if at all, more important in these days of expansion of governmental frontiers, than a similar declaration as to contractual relations."

As for the petitioners' amazing suggestion (Pet. Br. p. 41) that "the record" (no citation of authority being given) "indisputably shows that the Board has neither acted nor threatened to act under the Condition", surely the court may assume that a great government agency would not impose such a condition without a serious purpose to enforce it. What more is needed than the condition and its breach? However, we respectfully refer the court to the additional threat contained in the language of the Board's letter announcing the approval of the Bank's membership application on May 6, 1942 (R. 58-61, especially note first paragraph, p. 60),—a threat which was repeated and reemphasized by a letter written by the defendant Eccles to Mr. A. P. Giannini on November 13,

1942 (R. 82-85); again by the Board's official decision to ignore the formal demand made on December 4, 1945 for cancellation of Condition No. 4 (Complaint, par. XIV, R. 7); again by the resolution formally adopted by the Board of Governors on January 28, 1946, which was predicated upon the assumed validity of Condition No. 4 and the intention of the petitioners to enforce it at will (R. 10-11), and finally by the petitioners' vigorous assertion in this Court that Condition No. 4 is valid, that at any time now "the Board would feel free to invoke the Condition without the necessity of making any additional finding such as that required by the lower court" (Pet. Br. p. 32), and that the petitioners have an alleged statutory right, by means of the condition, to deprive the Bank of its Reserve membership and deposit insurance whenever they deem it desirable to do so. It cannot be denied that these threats are presently harmful to the Bank and will continue to be so until declaration of their validity or invalidity is judicially made. The seriousness of the impending harm is alleged in the complaint (par. XIV, R. 7) and strongly supported by the affidavits of Mr. Brewer, the president, and Mr. Luddy, a director of the Bank, who acquired his stock without knowledge of Condition No. 4 (R. 106-110).

Respondent is a relatively new bank, in a rapidly growing section of the country. Its present and continuing need of new capital for the proper expansion of its business must be assumed. Yet who would wish to invest additional money in the capital stock of this bank, while it is subject to termination of its Reserve membership and its federal deposit insurance (with

consequent double liability on stockholders[20]) on sixty days' notice at the mere whim of six men who have imposed a restriction upon this bank which has never been imposed upon any other bank anywhere and compliance with which is completely beyond the power of the bank or its directors or stockholders to control? How can a bank, subject to such a condition, attract able men as new officers when its very existence may be terminated at any time? How do the bank's officers dare make normal banking commitments for banking premises, or facilities, or employment contracts, or loans, or investments? What explanation can a bank officer make to a depositor who hears of this condition and demands assurances of the bank's continuation of membership in the Federal Reserve System and the continued benefits of federal deposit insurance? How can a bank, subject to such a condition, be expected to compete on equal terms with other banks not subject to the condition?

As Mr. Justice Holtzoff stated, "to say that no actual controversy exists between the parties" as to Condition No. 4 "is not realistic" (R. 21).

The majority opinion of the Court of Appeals of the District of Columbia disposed of petitioners' non-

---

[20]The market value of stock in the Bank is obviously depressed by the possibility of a notice to withdraw given by the Board under Condition No. 4, for, among other things, the California statute (1 Deering's California General Laws (1944 ed.), Act 652a, §1; Stats. 1931, p. 338; Amended by Stats. 1937, p. 627) provides for double liability of shareholders of a state bank except with respect to shares in a bank whose deposits are insured by the Federal Deposit Insurance Corporation pursuant to the Federal Reserve Act as amended.

justiciability contention in the following language (R. 132-133):

> "We need not elaborate upon the opinion of the learned justice of the District Court (Justice Alexander Holtzoff in Peoples Bank v. Eccles, 64 F. Supp. 811) which rejected that contention in denying the appellees' motion to dismiss the complaint. The resolution of January 28, 1946, disclaiming an immediate purpose to enforce Condition No. 4, protected the bank from literal enforcement of the condition only on that day; for the appellees argue in this court that enforcement is 'now justified by the facts,' although the resolution has not been rescinded, and a different one has not been adopted.
>
> "To those acquainted with the realities of banking, it is plain that public knowledge in the bank's service area of the existence of Condition No. 4 does incalculable harm to the bank. It is generally realized that nothing could more quickly cause depositors to lose confidence in a banking institution than withdrawal of federal deposit insurance. It is equally true that the confidence of depositors is undermined and weakened when they know that their insurance may be withdrawn on short notice, without a hearing, and for a cause having no relation whatever to the safety of their deposits. In such circumstances a positive threat by the Board to enforce the condition is not necessary to do the harm. The threat is implicit in the condition itself, and the harm is present and continuing, due to the mere existence of the condition."

CONCLUSION.

For the foregoing reasons, the decision of the Court of Appeals that Condition No. 4, as written, is invalid should be affirmed, and this Court should direct the entry of a declaratory judgment to that effect.

Dated: December 1, 1947.

Respectfully submitted,

SAMUEL B. STEWART, JR.,

LUTHER E. BIRDZELL,

Attorneys for Respondent.

(Appendix Follows.)

Appendix

EXCERPTS FROM FEDERAL RESERVE ACT.

SECTION 9. STATE BANKS AS MEMBERS.

1. *Applications for membership by State banks*

SEC. 9. Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the district in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. For the purposes of membership of any such bank the terms "capital" and "capital stock" shall include the amount of outstanding capital notes and debentures legally issued by the applying bank and purchased by the Reconstruction Finance Corporation. The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank. (12 U. S. C. § 321)

2. *Branches of State member banks*

Any such State bank which, at the date of the approval of this Act, has established and is operating a branch or branches in conformity with the State

law, may retain and operate the same while remaining or upon becoming a stockholder of such Federal reserve bank; but no such State bank may retain or acquire stock in a Federal reserve bank except upon relinquishment of any branch or branches established after the date of the approval of this Act beyond the limits of the city, town, or village in which the parent bank is situated. *Provided, however,* That nothing herein contained shall prevent any State member bank from establishing and operating branches in the United States or any dependency or insular possession thereof or in any foreign country, on the same terms and conditions and subject to the same limitations and restrictions as are applicable to the establishment of branches by national banks except that the approval of the Board of Governors of the Federal Reserve System, instead of the Comptroller of the Currency, shall be obtained before any State member bank may hereafter establish any branch and before any State bank hereafter admitted to membership may retain any branch established after February 25, 1927, beyond the limits of the city, town, or village in which the parent bank is situated. (12 U. S. C. § 321)

3. *Financial condition, management and powers*

In acting upon such applications the Board of Governors of the Federal Reserve System shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of this Act. (12 U. S. C. § 322)

* * * * * * *

8. *Forfeiture of membership*

If at any time it shall appear to the Board of Governors of the Federal Reserve System that a

member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section. (12 U. S. C. § 327)

"9. *Voluntary withdrawal from membership*

Any State bank or trust company desiring to withdraw from membership in a Federal reserve bank may do so, after six months' written notice shall have been filed with the Board of Governors of the Federal Reserve System, upon the surrender and cancellation of all of its holdings of capital stock in the Federal reserve bank: *Provided,* That the Board of Governors of the Federal Reserve System, in its discretion and subject to such conditions as it may prescribe, may waive such six months' notice in individual cases and may permit any such State bank or trust company to withdraw from membership in a Federal reserve bank prior to the expiration of six months from the date of the written notice of its intention to withdraw: *Provided, however,* That no Federal reserve bank shall, except under express authority of the Board of Governors of the Federal Reserve System, cancel within the same calendar year more than twenty-five per centum of its capital stock for the purpose of effecting voluntary withdrawals during that year. All such applications

shall be dealt with in the order in which they are filed with the board. Whenever a member bank shall surrender its stock holdings in a Federal reserve bank, or shall be ordered to do so by the Board of Governors of the Federal Reserve System, under authority of law, all of its rights and privileges as a member bank shall thereupon cease and determine, and after due provision has been made for any indebtedness due or to become due to the Federal reserve bank it shall be entitled to a refund of its cash paid subscription with interest at the rate of one-half of one per centum per month from date of last dividend, if earned, the amount refunded in no event to exceed the book value of the stock at that time, and shall likewise be entitled to repayment of deposits and of any other balance due from the Federal reserve bank. (12 U. S. C. § 328)

* * * * * * *

11. *Waiver of membership requirements as to insured banks*

In order to facilitate the admission to membership in the Federal Reserve System of any State bank which is required under subsection (y) of section 12B of this Act to become a member of the Federal Reserve System in order to be an insured bank or continue to have any part of its deposits insured under such section 12B, the Board of Governors of the Federal Reserve System may waive in whole or in part the requirements of this section relating to the admission of such bank to membership: *Provided,* That, if such bank is admitted with a capital less than that required for the organization of a national bank in the same place and its capital and surplus are not, in the judgment of the Board of Governors of the Federal Reserve System, adequate in relation to its

liabilities to depositors and other creditors, the said Board may, in its discretion, require such bank to increase its capital and surplus to such amount as the Board may deem necessary within such period prescribed by the Board as in its judgment shall be reasonable in view of all the circumstances: *Provided, however,* That no such bank shall be required to increase its capital to an amount in excess of that required for the organization of a national bank in the same place. (12 U. S. C. § 329a)

12. *Laws to which subject.*

Banks becoming members of the Federal Reserve System under authority of this section shall be subject to the provisions of this section and to those of this Act which relate specifically to member banks, but shall not be subject to examination under the provisions of the first two paragraphs of section fifty-two hundred and forty of the Revised Statutes as amended by section twenty-one of this Act. Subject to the provisions of this Act and to the regulations of the board made pursuant thereto, any bank becoming a member of the Federal Reserve System *shall retain its full charter and statutory rights as a State bank* or trust company, and *may continue to exercise all corporate powers granted it by the State* in which it was created, and shall be entitled to all privileges of member banks: *Provided, however,* That no Federal reserve bank shall be permitted to discount for any State bank or trust company notes, drafts, or bills of exchange of any one borrower who is liable for borrowed money to such State bank or trust company in an amount greater than that which could be borrowed lawfully from such State bank or trust company were it a national banking association. The Federal reserve bank, as a condition of the discount of notes, drafts,

and bills of exchange for such State bank or trust company, shall require a certificate or guaranty to the effect that the borrower is not liable to such bank in excess of the amount provided by this section, and will not be permitted to become liable in excess of this amount while such notes, drafts, or bills of exchange are under discount with the Federal reserve bank. (12 U. S. C. § 330)

* * * * * * *

SECTION 12B. INSURANCE OF BANK DEPOSITS

* * * * * * *

5. *Continuance of insurance of member banks.*

(e)(1) Every operating State or national member bank, including a bank incorporated since March 10, 1933, licensed on or before the effective date by the Secretary of the Treasury shall be and continue to be, without application or approval, an insured bank and shall be subject to the provisions of this section. (12 U. S. C. § 264(e))

6. *Member banks entitled to insurance benefits*

(2) After the effective date, every national member bank which is authorized to commence or resume the business of banking, and every State bank which is converted into a national member bank or which becomes a member of the Federal Reserve System, shall be an insured bank from the time it is authorized to commence or resume business or becomes a member of the Federal Reserve System. The certificate herein prescribed shall be issued to the Corporation by the Comptroller of the Currency in the case of such national member bank, or by the Board of Governors of the Federal Reserve System in the case of such State member bank: *Provided,* That in the

case of an insured bank which is admitted to membership in the Federal Reserve System or an insured State bank which is converted into a national member bank, such certificate shall not be required, and the bank shall continue as an insured bank. Such certificate shall state that the bank is authorized to transact the business of banking in the case of a national member bank, or is a member of the Federal Reserve System in the case of a State member bank, and that consideration has been given to the factors enumerated in subsection (g) of this section. (12 U. S. C. § 264(e).

7. *Continuance of insurance of nonmember banks*

(f)(1) Every bank which is not a member of the Federal Reserve System which on June 30, 1935 was or thereafter became a member of the Temporary Federal Deposit Insurance Fund or of the Fund For Mutuals heretofore created pursuant to the provisions of this section, shall be and continue to be, without application or approval, an insured bank and shall be subject to the provisions of this section: *Provided,* That any State nonmember bank which was admitted to the said Temporary Federal Deposit Insurance Fund or the Fund For Mutuals but which did not file on or before the effective date an October 1, 1934 certified statement and make the payments thereon required by law, shall cease to be an insured bank on August 31, 1935: *Provided further,* That no bank admitted to the said Temporary Federal Deposit Insurance Fund or the Fund For Mutuals prior to the effective date shall, after August 31, 1935, be an insured bank or have its deposits insured by the Corporation, if such bank shall have permanently discontinued its banking operations prior to the effective date. (12 U. S. C. § 264(f))

8. *Nonmember banks entitled to insurance benefits*

(2) Subject to the provisions of this section, any national nonmember bank, upon application by the bank and certification by the Comptroller of the Currency in the manner prescribed in subsection (e) of this section, and any State nonmember bank, upon application to and examination by the Corporation and approval by the board of directors, may become an insured bank. Before approving the application of any such State nonmember bank, the board of directors shall give consideration to the factors enumerated in subsection (g) of this section and shall determine, upon the basis of a thorough examination of such bank, that its assets in excess of its capital requirements are adequate to enable it to meet all its liabilities to depositors and other creditors as shown by the books of the bank. (12 U. S. C. § 264(f))

9. *Factors to be considered in insuring banks*

(g) The factors to be enumerated in the certificate required under subsection (e) and to be considered by the board of directors under subsection (f) shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this section. (12 U.S.C. § 264(g))

* * * * * * *

19. *Termination of insurance of nonmember banks*

(i)(1) Any insured bank (except a national member bank or State member bank) may, upon not less than ninety days' written notice to the Corporation, and to the Reconstruction Finance Corporation if it

owns or holds as pledgee any preferred stock, capital notes, or debentures of such bank, terminate its status as an insured bank. Whenever the board of directors shall find that an insured bank or its directors or trustees have continued unsafe or unsound practices in conducting the business of such bank, or have knowingly or negligently permitted any of its officers or agents to violate any provision of any law or regulation to which the insured bank is subject, the board of directors shall first give to the Comptroller of the Currency in the case of a national bank or a District bank, to the authority having supervision of the bank in the case of a State bank, or to the Board of Governors of the Federal Reserve System in the case of a State member bank, a statement with respect to such practices or violations for the purpose of securing the correction thereof. Unless such correction shall be made within one hundred and twenty days or such shorter period of time as the Comptroller of the Currency, the State authority, or Board of Governors of the Federal Reserve System, as the case may be, shall require, the board of directors, if it shall determine to proceed further, shall give to the bank not less than thirty days' written notice of intention to terminate the status of the bank as an insured bank, and shall fix a time and place for a hearing before the board of directors or before a person designated by it to conduct such hearing, at which evidence may be produced, and upon such evidence the board of directors shall make written findings which shall be conclusive. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank. If the board of directors shall find that any violation specified in such notice has been established, the board of directors may order

that the insured status of the bank be terminated on a date subsequent to such finding and to the expiration of the time specified in such notice of intention. The Corporation may publish notice of such termination and the bank shall give notice of such termination to each of its depositors at his last address of record on the books of the bank, in such manner and at such time as the board of directors may find to be necessary and may order for the protection of depositors. After the termination of the insured status of any bank under the provisions of this paragraph, the insured deposits of each depositor in the bank on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of two years to be insured, and the bank shall continue to pay to the Corporation assessments as in the case of an insured bank during such period. No additions to any such deposits and no new deposits in such bank made after the date of such termination shall be insured by the Corporation, and the bank shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such bank shall, in all other respects, be subject to the duties and obligations of an insured bank for the period of two years from the date of such termination, and in the event that such bank shall be closed on account of inability to meet the demands of its depositors within such period of two years, the Corporation shall have the same powers and rights with respect to such bank as in case of an insured bank. (12 U. S. C. § 264(i))

67. *Nondiscrimination*

(y) It is not the purpose of this section to discriminate, in any manner, against State nonmember, and in favor of, national or member banks; but the purpose is to provide all banks with the same opportunity to obtain and enjoy the benefits of this section. No bank shall be discriminated against because its capital stock is less than the amount required for eligibility for admission into the Federal Reserve System. (12 U. S. C. § 264(y))

EXCERPTS FROM BANKING ACT OF 1933 RELATING TO PENALTIES FOR "UNSAFE OR UNSOUND PRACTICES" IN BUSINESS OF A STATE MEMBER BANK

(As set forth in United States Code, Title 12.)

12 U.S.C. § 77. Removal of director or officer.

Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed

from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided,* That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court. June 16, 1933, c. 89, § 30, 48 Stat. 193; Aug. 23, 1935, c. 614, § 203(a), 49 Stat. 704.

On the reverse side of this sheet is reproduced page 20 from the Annual Report of the Federal Deposit Insurance Corporation for the year ended December 31, 1946.

In July 1946 the Corporation instituted an improved method of examination of mutual savings banks. A description of this method of examination is given in Part Three of this report.

Unsafe and unsound banking practices and violations of law or regulations. During 1946 proceedings were initiated against one insured bank for engaging in unsafe and unsound banking practices and were continued against four other banks. The bank against which proceedings were initiated was charged with continued violation of law to which it was subject, with the maintenance of lax lending and collection policies, and with continued operation in an extended condition and by a self-serving and hazardous management. Of the five cases, corrections were made in two banks; the other three were pending at the close of the year.

The number of banks charged with unsafe and unsound practices since the effective date of the Banking Act of 1935, and the disposition of these cases, are given in Table 5.

Table 5. Action to Terminate Insured Status of Banks Charged with Engaging in Unsafe or Unsound Practices or Violations of Law or Regulations, 1936-1946

Disposition or status	Total cases 1936-1946[1]	Pending beginning of 1946	Started during 1946
Total banks against which action was taken	132	4	1
Cases closed:			
Corrections made	28	2	
Insured status terminated, or date for such termination set by Corporation, for failure to make corrections:			
Banks suspended prior to or on date of termination of insured status	7		
Banks continued in operation[2]	3		
Banks suspended prior to setting of date of termination of insured status by Corporation	32		
Banks absorbed or succeeded by other banks:			
With financial aid of the Corporation	60		
Without financial aid of the Corporation	4		
Cases pending December 31, 1946:			
Corrective program pending	1	1	
Recapitalization program pending	1	1	
Action deferred pending examination	1		1

[1] No action to terminate the insured status of any bank was taken before 1936. In 4 cases where initial action was replaced by action based upon additional charges, only the later action is included.
[2] One of these suspended 4 months after its insured status was terminated.
Back data—See the following Annual Reports of the Corporation for 1945, p. 22.

Approval of banks for insurance. During 1946 the Corporation approved the applications of 157 banks for admission to insurance. Of these, 109 were new banks, including one which reopened after having been inactive and six which succeeded branches of other banks. The remaining 48 banks approved for insurance consisted of thirty banks or successors thereto which were operating as noninsured banks at the beginning of the year and eighteen insured banks which obtained new charters or withdrew from the Federal Reserve System and applied for

On the next succeeding four pages are reproduced pages 246, 247, 248 and 249 from the Annual Report of the Federal Deposit Insurance Corporation for the year ended December 31, 1940.

	Total
Number of banks[3]	97
Disposition as of December 31, 1940:	
Corrections made	15
Insured status terminated for failure to make corrections[3]	3
Banks suspended[4]	34
Banks absorbed, succeeded, or reorganised[5]	38
Action deferred pending consummation of recapitalisation or merger plans	4
Correction period provided by law not expired	1
Further proceedings otherwise deferred	2

[1] No action to terminate insured status of any bank was started before 1936. In 3 cases where i
the latter action is included.
[3] In the case of 2 banks against which action was started in 1939 and of 17 banks in 1940, resolutions r
were formally adopted by the Board of Directors of the Corporation, but the sending of statements to t
[4] One of these 3 banks suspended 4 months after its insured status was terminated.
[4] The date for official termination of insured status was set in 5 of these cases, but was not effective
[5] In all except 1 of these 38 cases, the Corporation made loans to facilitate the mergers or reorgan

Table 176. UNSAFE OR UNSOUND BANKING PRACTICES AND VIOLATIONS OF LA
INSURED STATUS WAS STARTED AGAINST 97 INSURED BANKS, AU

Type of practice or violation	Total	Nu... 1936
1. Capital:		
(a) Continued operation of bank with seriously impaired capital	79	
(b) Continued operation of bank although insolvent	9	
(c) Continued operation of bank with inadequate capital	12	
(d) Other practices or violations:		
Failure to take means suggested by examiners for restoration of capital	2	
Reduction of capital without approval of the Corporation	1	
2. Management and general practices:		
(a) Maintenance of lax credit, loaning, and collection policies	66	
(b) Continued carrying of loans in bank's assets, thereby failing to disclose true statement of condition	63	
(c) Continued operation of bank by weak, hazardous, untrustworthy, or incapable management	52	
(d) Maintenance of lax investment policies	29	
(e) Unwarranted and excessive loans to directors, officers, employees, and their interests	27	
(f) Failure to observe recommendations to remedy objectionable practices or conditions	13	
(g) Deliberate misrepresentation examiner records tr... or		

Number of banks against which action was started in—[1]				
1936	1937	1938	1939	1940
22	25	12	19	19
10	3	1	1	.....
1	2	.....	.....	.....
9	14	6	4	1
2	6	4	14	12
.....	.....	1	.....	3
.....	.....	.....	.....	1
.....	.....	.....	.....	2

nitial action was replaced by action based upon additional charges, only

elative to unsafe or unsound practices or violations of law or regulations he appropriate supervisory agencies was indefinitely delayed.

before the banks suspended.
inations.

W OR REGULATIONS UPON WHICH ACTION TO TERMINATE GUST 23, 1935, TO DECEMBER 31, 1940

mber of banks engaging in practice or violation[1]

	Action started in—			
	1937	1938	1939	1940
13	18	10	19	19
2	4	2	1	.....
....	2	.....	5	5
1	1	.....	.....	.....
1	.....	.....	.....	.....
19	18	10	12	7
9	15	5	12	18
8	15	10	13	7
6	5	2	9	7
8	7	5	3	4
6	5	.....	1	.....

Table 176. UNSAFE OR UNSOUND BANKING PRACTICES AND VIOLATIONS OF LAW OR REGULATIONS UPON WHICH ACTION TO TERMINATE INSURED STATUS WAS STARTED AGAINST 97 INSURED BANKS, AUGUST 23, 1935, TO DECEMBER 31, 1940—Continued

Type of practice or violation	Number of banks engaging in practice or violation[1]					
	Total	Action started in—				
		1936	1937	1938	1939	1940
(h) Other practices or violations:						
Operation without legally constituted Board of Directors	2	1	1			
Failure of cashier to comply with instructions of Board of Directors	1	1				
Failure of Board of Directors to make examinations as required by State law	1			1		
Failure to call annual meetings of stockholders	1	1				
Failure of Board of Directors to supervise management properly	1	1				
Failure of Board of Directors to attend regular meetings or to comply with bank's by-laws	3	1	2			
Failure to bond employees properly and to collect under surety bond	7	4	2		1	
Continued employment of cashier known to have committed gross irregularities	2	1	1			
Excessive salaries and improper diversion of funds for personal uses	2	2				
3. Loan and investment practices:						
(a) Excessive volume of past due or nonincome-producing loans	45	8	11	7	12	7
(b) Failure to obtain and maintain current and adequate credit data and financial statements, and failure to secure appraisal and supporting documents on other real estate owned	41	18	17	5	5	1
(c) Unwarranted and excessive extensions of credit in violation of law	35	13	14	5	2	1
(d) Continued carrying of unwarranted and excessive amounts of other real estate owned and potential other real estate	42	4	2	9	17	10
(e) Excessive volume of loans in Classifications II and III[2]	34	9	10	11	3	2
(f) Excessive volume of assets in Classifications II and III or generally unsatisfactory asset condition[2]	39	3	3	2	13	13
(g) Excessive volume of loans in Classification IV[2]	33	4	13	10	5	6
(h) Excessive volume of assets in Classification IV[2]	31		5	2	13	12
(i) Excessive investment in substandard, speculative, and defaulted securities	14	3	3		4	4

(j) Unwarranted and excessive volume of nonincome-producing assets	15	1	2		7	5
(k) Progressive deterioration of assets	18		1		5	12
(l) Habitual granting or unwarranted payment of overdrafts	13	5	6	2		
(m) Continued frozen or extended position of loan portfolio	12	7	4	1		
(n) Carrying of other real estate owned in excess of maximum time permitted by law	8		3	3	1	1
(o) Unwarranted and excessive concentrations of credit	6		3	1	2	
(p) Other practices or violations:						
Severe losses sustained and previously written off	2				2	
Investment and retention of assets in contravention of existing laws or regulations	1					1
Unwarranted and excessive liability in connection with a certain property	1					1
4. Miscellaneous:						
(a) Failure to maintain adequate bank records, continuance of inaccurate accounting procedures, and negligence in operating methods	14	9	5			
(b) Poor or rapidly declining earnings	13		2		4	7
(c) Payment of interest on time deposits in violation of regulations	13	3	7	3		
(d) Unwarranted or illegal payment or declaration of dividends or interest on capital	8	2	2	3	1	
(e) Unsatisfactory administration of trust department or unauthorized or illegal investment of trust funds	6		2		2	2
(f) Other practices or violations:						
Continued borrowings, and large amount of assets pledged as collateral security to borrowings	3		2	1		
Failure to maintain legal reserves	2	2				
Low liquidity ratio	4		3	1		
Unwarranted amount of public funds on deposit in proportion to net quick assets	2	2				
Not carrying on type of banking prescribed in its charter or permitted by State law	1		1			
Failure to maintain adequate reserves	1				1	
Acceptance and carrying of public funds without complying with State law	1		1			
Negligent payment of certificates of deposit or of checks drawn against fictitious balances	2	1	1			
Failure to depreciate fixed assets properly	1			1		
Unwarranted and improper disbursement of bank's funds	1	1				
Unwarranted increase in salaries of officers and employees	2	2				
Unauthorized allocation of funds and credits to the payment of personal obligations of officers	1	1				

[1] Most of the banks engaged in several practices or violations. For the number of banks against which action was started each year, see Table 178.
[2] For method of classifying assets, see Explanatory Note to Part V, pages 86-87.

Deposits, Capital and Surplus, and Number of Offices of All Banks Operating in Los Angeles County as of December 31, 1942, as Ascertained from Rand McNally Bankers Directory, First Edition 1943.
(Transamerica's Interests Are as Ascertained from Moody's Manual of Investments, 1943, and Walker's Manual of Pacific Coast Securities, 1943 Ed.)

Name of Bank	Los Angeles County Deposits (000.00 Omitted)	Total Capital and Surplus (000.00 Omitted)	Number and Percentage of Banking Offices Located in Los Angeles County (100% except where otherwise noted)
Banks in which Transamerica had no interest:			
1. California Bank	$206,222	$ 8,500	44
2. Citizens National Trust and Savings Bank	195,651	8,350	33
3. Union Bank and Trust Company	64,197	4,750	1
4. Farmers and Merchants National Bank	202,853	7,500	1
5. Security First National Bank of Los Angeles	637,122*	48,000	89—(79%)
6. Broadway State Bank	1,961	144	1
7. Canadian Bank of Commerce	9,995*	1,625	1—(50%)
8. Azusa—Valley Savings Bank	1,059	100	1
9. First National Bank of Azusa	1,677	155	1
10. First National Bank of Bellflower	4,150	200	1
11. Beverly Hills National Bank and Trust Company	4,159	300	1
12. Burbank State Bank	2,110	128	1
13. Citizens National Bank of Claremont	1,379	113	1
14. Compton National Bank	2,689	140	1
15. Covina National Bank	1,706	100	1
16. The Southern County Bank	1,931*	208	2—(50%)
17. First National Bank at Glendale	4,915	240	2
18. Hollywood State Bank	6,206	295	1
19. Peoples Bank—Lakewood Village	897	112	1
20. First National Bank—Laverne	1,140	84	1
21. Farmers and Merchants Bank of Long Beach	28,456	1,250	3
22. Western Bank—Long Beach	4,597	379	1
23. Citizens Bank—Monrovia	1,250	125	1
24. Norwalk Commercial and Savings Bank	1,100	102	1
25. Citizens Commercial Trust and Savings Bank—Pasadena	7,371	630	1
28. First National Bank of Lamanda Park	1,830	55	1
29. First National Bank—Pomona	10,325	542	1
30. First State Bank—Rosemead	1,426	97	1
31. Fishermen and Merchants Bank—San Pedro	2,546	175	1
32. Santa Monica Commercial and Savings Bank	4,203	265	1
33. Sierra Madre Savings Bank	1,148	100	1
34. Torrance National Bank	1,414	120	1
35. First National Bank—Vernon	2,861	350	1
36. Whittier National Trust and Savings Bank	6,216	455	1
	$1,437,191	$66,423	205

Name of Bank	Los Angeles County Deposits (000.00 Omitted)	Total Capital and Surplus (000.00 Omitted)	Number and Percentage of Banking Offices Located in Los Angeles County (100% except where otherwise noted)	Per Cent of Stock Held by Transamerica
Banks in which Transamerica owned Common and/or Preferred Stock:				
1. Farmers and Merchants Bank of Watts	$ 2,057	$ 160	1	41.8
2. First Trust and Savings Bank of Pasadena	21,301	1,563	2	65.3
3. Temple City National Bank	1,295	62	1	77.3
4. Bank of America	749,981*	121,216	143—(29%),	25.05**
	$774,634	$123,001	147	

*All 40 banks, except the 4 banks which refer to this note, have all their offices in Los Angeles County. The percentage figure shown, representing the proportion of total offices of the 4 exceptions in Los Angeles County, has been applied to the total deposits shown in the Rand McNally directory for each of those 4 banks to produce the estimated Los Angeles County deposit figure in each of those cases. The statewide deposit totals shown by the directory for those 4 banks (000.00 omitted) are:

Security First National	$ 806,484
Canadian Bank of Commerce	19,990
The Southern County Bank	3,862
Bank of America	2,586,140

**Represents 17.3% of common stock and 91.2% of preferred stock.